TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 213.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 18, 1900.

(18,001.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 23, 1901.

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1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered, that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for a second amended and supplemental complaint, by leave of the court first had and obtained, complains of the defendant herein, and for cause of action alleges:

2 I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said

fractional portion of said St. Louis Lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side
3 line of the surface of the said St. Louis Quartz Lode mining claim, which is situated in Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches, marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east,
4 north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529.7 feet distant, intersects said township line, a granite stone 18 by 16 by 7 inches, marked "54 A, 54 M. C.," 1,069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21.5 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1,500 feet in length

along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three-hundredths of an acre.

Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode
5 mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three thereof, 226 feet to a point on the boundary line of the St. Louis lode, between corners one and two; thence south 20 degrees 28 minutes west along said boundary, between corners one and two 60.5 feet to corner No. 2 of the St. Louis lode; thence south 51 degrees 30 minutes west 403 feet to corner No. 3 of said St. Louis lode; thence north 45 degrees 30 minutes west along the line of boundary of the said St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

III.

That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, loca-
6 tion and recordation of the said St. Louis Lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode mining claim.

IV.

That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears

north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz
7 Lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz, rock and ore
8 therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plaintiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of The St. Louis Mining & Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of
9 said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, State of Montana.

(Endorsed:) No. 291. (Title of court and cause.) Second amended and supplemental complaint. Filed and entered June 26, 1899. Geo. W. Sproule, clerk.

10 The summons in this cause as heretofore issued being in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Howkins, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of Helena, county of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

11 You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of Mon-

tana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode mining claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plain-
12 tiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana — Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States court.

Helena, Sept. 21, 1893.

WM. F. FURAY.
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

13 (Endorsed:) No. 291. (Title of court and cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, clerk.

And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2, and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended and supplemental complaint contained.

14 III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the dis-
15 trict court of the first judicial district of the State of Montana, within and for the county of Lewis & Clarke, wherein this

defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B," and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

16 Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Alexander Burrell, being first duly sworn, deposes and says: The above-named defendant is a corporation, and I am an officer thereof, to wit, I am its general manager; I have read the foregoing answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

ALEXANDER BURRELL.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1899.

W. E. CULLEN, JR.,
Notary Public in and for the County of Lewis & Clarke, Montana.

EXHIBIT "A."

Know all men by these presents: That I, Charles Mayger, am held and firmly bound unto William Robinson, and James Huggins, and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators and assigns, firmly by these presents.

17 Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed

18 of conveyance of that certain lot, piece or parcel of mining ground, situate in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode claim and the Nine Hour Lode claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

19 Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 p. m.

O. B. TOTTEN.

20 EXHIBIT "B."

Deed to St. Louis Mining & Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke and State of Montana, its duly authorized agent and attorney-in-fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its

assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32
21 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the
22 said party of the second part and its assigns forever.

In witness whereof, the said Willam Mayger, as attorney-in-fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney-in-fact.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney-in-fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney-in-fact, who duly acknowledged to me that, as such agent and at-

torney-in-fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

23 (Endorsed:) No. 291. (Title of court and cause.) Answer to supplemental complaint. Filed and entered June 30, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from
24 claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the St. Louis Lode mining claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode mining claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes or ledges, which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover only such quartz rock or ore and the value thereof, and the damages

for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode mining claim, exclusive of the said thirty-foot strip or compromise ground.

Admits that said Mayger obtained a patent for the said
25 thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the court and the deed mentioned in said defendant's answer executed in pursuance thereof.

And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this honorable court that the said thirty-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in dis-
26 trict court of the first judicial district of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim, the boundaries of which claims had been and were at the time of the execution of the said agreement in conflict, and concerning which a controversy

then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed which the court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

27 Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) No. 291. (Title of court and cause.) Replication. Filed and entered July 14, 1899. Geo. W. *W.* Sproule, clerk.

28 And thereafter, to wit, on the twelfth day of August, 1899, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, }
vs. }
MONTANA MINING COMPANY, LIMITED, Defendant. }

Verdict.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*

(Endorsed:) No. 291. (Title of court and cause.) Verdict. Filed and entered August 12, 1899. Geo. W. Sproule, clerk.

29 And thereafter, to wit, on the sixteenth day of August, 1899, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Judgment.

Be it remembered, that on this seventh day of August, A. D. 1899, the above-entitled cause coming on for hearing, and the same having been duly submitted to a jury of twelve lawful men, duly empaneled and sworn to try the issue herein, the following verdict was duly returned into court, to wit:

30 "In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury, in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars (23,209.00).

T. H. CLEWELL, *Foreman.*"

It is therefore considered, ordered and adjudged that the said plaintiff have and recover of the said defendant the said sum of twenty-three thousand two hundred and nine dollars ($23,209.00), together with its costs in this behalf expended, taxed at the sum of ninety-five and sixty-five one-hundredths dollars, and that it have execution therefor.

Dated August 16, 1899.

Entered August 16, 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

31 Attest: A true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Clerks Certificate to Judgment-roll.

I, George W. Sproule, clerk of the circuit court of the United States, for the ninth judicial circuit, district of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 16th day of August, 1899.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

(Endorsed:) No. 291. (Title of court and cause.) Judgment-roll. Filed Aug. 16, 1899. Geo. W. Sproule, clerk.

32 And thereafter, to wit, on the twenty-eighth day of August, A. D. 1899, a bill of exceptions was duly allowed, signed and filed, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered, that on the trial of the above-entitled action to a jury, on the eighth day of August, A. D. 1899, that being one of the days of court of the April term, 1899, of the said circuit court, after the said jury had been duly empaneled and sworn to try the case, the defendant objected to the introduction of any testimony on the part of the plaintiff, for that the second amended supplemental complaint, which had been theretofore read to the jury, did
33 not state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff had no cause of action.

But the court overruled such objection and permitted the plaintiff to offer testimony, to which ruling of the court the defendant then and there duly excepted.

Whereupon the plaintiff called and had sworn as a witness in its behalf Mr. WM. MAYGER, who testified substantially as follows, to wit:

I am the superintendent and general manager of the plaintiff company and have filled that position since 1887. I am acquainted with the discovery vein of the St. Louis Lode mining claim. I have pointed out the discovery shaft to Mr. Keerl, the surveyor.

Whereupon the witness was asked the following question:

Q. And was that on the vein which is in controversy here or not?

To which question the defendant objected for the reason that the same was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis Lode mining claim and no issue upon that point.

But the court overruled such objection, to which ruling of the court the defendant then and there excepted.

The witness answered:

A. No, sir; that was on the vein for which we took the location. I am familiar with the boundaries of the St. Louis mining claim as shown on the map.

Whereupon the witness was asked the following question:

34 Q. Which way does the discovery vein of the St. Louis mining claim run?

To which question the defendant objected for the reason that the same was incompetent, irrelevant and immaterial, there being no allegations in the complaint as to the course or direction of the discovery vein, nor any allegation that there was a discovery vein, the pleadings being limited to the recovery of damages for the extraction of ore from the vein known as the Drum Lummon vein. But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there duly excepted.

The witness answered:

A. It runs more parallel with the location of the St. Louis mining claim than it does any other direction—not directly parallel with it, but nearly so. It runs nearly at right angles to the lines marked on the map 3 and 4 and 1 and 6.

Thereupon it was stipulated between counsel, with leave of court, that all testimony offered with reference to the located vein should be received subject to the objection of the defendant, that there was nothing in the complaint which would make such testimony relevant.

The WITNESS (continuing): The vein dips to the east and in the direction of the Nine Hour mining claim. It has been developed within three or four hundred feet of the north end line and within seventy feet of the south end line of the St. Louis claim.

The witness having testified that he executed the deed, a copy of which is attached to the answer herein, the following question was asked him:

35 Q. Under what circumstances was that deed executed?

To which the defendant objected as follows: "If that is evidence anywhere it is evidence in rebuttal and not on the direct case."

The objection was by the court sustained on that ground.

Plaintiff thereupon called one JAMES S. KEERL, who testified as follows:

I am a civil engineer. I have surveyed the premises known as the Nine Hour and adjoining claims and have made a map of it, which is here produced in court, marked Plaintiff's Exhibit No. 1. (Here insert map.)

The vein claimed by the plaintiff in this case is bounded by a line drawn down through a point in the easterly boundary line of the St. Louis claim 520 feet south from corner No. 1 of the said claim, and by a line drawn down through the westerly line of the compromise ground, at a point 108 feet southerly from the point of intersection of the westerly side line of the compromise ground with the easterly side line of the St. Louis claim.

Thereupon witness was asked the following question:

Q. And how is that line drawn there with reference to the end lines of the St. Louis claim?

To which question the defendant objected for the reason that the same was incompetent and immaterial, it not having been established which were the end lines, or which the side lines of the St. Louis claim.

36 But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there excepted.

A. It is drawn parallel to the end lines of the St. Louis claim to corner- 3 and 4. I have made measurements and calculations to ascertain the amount of ore taken out to the east of the west side line of the compromise ground and north of the one hundred and eight foot plane. There is a stope which is an extension of the eighty-five-foot level south of the compromise ground, then there is a stope on the twenty-foot level, lying immediately north of the one hundred and eight foot plane, and a stope in the one hundred and ninety foot level. The line marked one hundred and eight foot plane and the line marked one hundred and thirty-three foot plane are parallel to the five hundred and twenty foot line.

Whereupon the witness was asked the following question:

Q. Now, confine yourself to the measurements which were made to the east of the line known as the west side line of the thirty-foot strip—I wish you would give to the jury the different calculations

you made north of the one hundred and eight foot plane, and south of the plane which intersects the easterly boundary of the St. Louis claim at the point where the westerly boundary of the thirty-foot strip intersects it?

To which the defendant objected, for the reason that the testimony sought was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the compromise ground,
37 "together with all the mineral therein contained," and alleged in the answer that the said compromise ground had been conveyed by the plaintiff to the defendant in pursuance of a bond for a deed describing the said compromise ground by metes and bounds, and conveying the *said* to the said defendant, "together with all the mineral therein contained," which said bond and deed, being attached as exhibits to the answer, were not denied, but specially admitted, by the replication, and that therefore plaintiff was estopped from claiming any mineral within said compromise ground.

But the court overruled such objection and permitted the witness to testify with reference thereto, to which ruling of the court the defendant then and there duly excepted.

A. In my calculations I have given them block numbers, which I will mark on the map. Block No. 8 is designated as the stope at the south end of the St. Louis Company's eighty-foot level.

The plaintiff then offered in evidence the complaint and exhibit attached thereto, the findings and the judgment of the court, hereinafter contained and set forth in the evidence in rebuttal. To which the defendant objected because it was not the proper time to offer the same.

Whereupon the witness was asked the following question:

Q. And how much did you compute was extracted from that?

38 To which question the defendant objected for the reason that it appeared from the testimony that the same was within the vertical lines of the compromise ground, and under the pleadings plaintiff is estopped to claim any mineral found in said stope.

But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there duly excepted.

A. The cubic feet in block No. 8 is 2,187.9, equivalent to 168.3 tons. Block No. 9 is the stope above the twenty-foot level, lying north of the one hundred and eight foot plane and east of the west line of the thirty-foot strip.

Q. How much was extracted from that?

To which question the defendant objected for the reason that the testimony shows that the same was within the compromise ground and that, under the pleadings and by virtue of the bond and deed attached as exhibits to the answer, the plaintiff was estopped from claiming such mineral.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant then and there duly excepted.

A. There is 798 cubic feet, equivalent to 61.4 tons. Block No. 10 is the ore removed from the one hundred and ninety foot level, north of the one hundred and eight foot line—that is 1,904 cubic feet, or 146.5 tons. A small quantity of ore was taken from the winze at the end of plaintiff's eighty-five-foot level. The ore so taken is west of the west line of the thirty-foot strip. There was 28.8 cubic feet of it, equivalent to 2.2 tons. I marked this block No. 11.

39 Cross-examination:

The average height of the stope, block No. 8, is 15.3, the average width 6.5 feet, average length 22 feet. There is 35 feet of block No. 10 north of the one hundred and eight foot line. It is 8 feet high and 6.8 feet wide. Those are the averages.

Plaintiff also called and had sworn one JOHN R. PARKS, who testified substantially as follows, to wit:

I am a mining engineer. I have been consulting engineer of the plaintiff company for about nine years. I have examined the underground and surface workings of the Nine Hour claim.

Whereupon the witness was asked the following question:

Q. Do you know where the discovery point of the St. Louis is?

To which question the defendant objected, for the reason that the same was immaterial, it not being alleged in the complaint that there was any discovery point or vein within the boundaries of said claim.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant duly excepted.

A. It is connected with the discovery vein. The discovery vein runs generally parallel to the side lines.

Thereupon the witness was asked the following question:

Q. How far is it developed by underground drifts and works?

40 To which question the defendant objected, for the reason that there was no issue made by the pleadings relative to the discovery vein, or any vein, save the Drum Lummon.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant duly excepted.

A. On the south end it has been developed within seventy feet, and the same vein has been developed by people owning the adjoining property to within a short distance of the south end. It crosses the south end line. Northerly it is followed into the sixty-five-foot shaft and 60, to eighty feet beyond. I think it runs out of

the north end of the claim. The discovery vein dips to the east. The apex of the Drum Lummon is within the St. Louis claim at the five hundred and twenty foot point, and continues southerly to the one hundred and eight foot point. It dips to the east. Between these planes I have gone into the underground workings to ascertain what ore has been taken out. We divided the ground up into three blocks. These are blocks Nos. 8, 9 and 10 mentioned by Mr. Keerl.

Thereupon the defendant objected to all of the testimony relating to these blocks, for the reason that it appears from the testimony that blocks Nos. 8, 9 and 11 were within the compromise ground, and that under the pleadings plaintiff was estopped to claim any mineral found therein, and was likewise estopped by the pleadings from claiming any ores in block No. 10.

But the court overruled such objection and permitted
41 the witness to answer the question, to which ruling of the court the defendant then and there duly excepted.

A. Block No. 8 is the ground stoped out by the Montana Company at the south end of the eighty-five-foot level and lies east of the east side line of the St. Louis Lode claim and north of the one hundred and eight foot line. The cubic contents of this block are as stated by Mr. Keerl. I took samples from block No. 8, which averaged $13.28 per ton. The ore taken from near the top of the winze, block No. 11, ran sixty and eighty cents to one dollar and twenty cents per ton.

Block No. 9 is a stope above the twenty-foot level, east of the St. Louis side line and north of the one hundred and eight foot line. The average is nine and a half feet in height, fourteen feet in width at right angles to the walls is six feet. The volume of the stope is 798 cubic feet. I took samples at the time the stope was driven right near there, and recently, within the last few weeks, I have taken samples in the Montana Company's apex shaft, which practically shows the remainder of the face of this old drift. The gold and silver value in this ore was $165.10 per ton. I assisted in measuring block No. 10. Its cubical contents as given by Mr. Keerl. In measuring its height we were limited by the timbering. We do not know just how much stoping has been done above that. I determined the value of the ore in that stope from the nearest adjoining ground where we could get the ore. The value of that was $127.14 per ton, or a gross value of $18,626.01.

42 Block No. 11 is 6 feet long, one foot wide, and 4.8 feet deep. I did not compute its value.

Block 9 was measured away back in 1894. The defendant company's miners were there working in block 9 at the time. Block 9 is inaccessible at present, and while portions of the level may be open you cannot get to it by reason of the fact that other portions are filled up by caved ground. There are several levels between these planes. The four-hundred-foot level extends the full length of the ground.

Thereupon the witness was asked the following question:

Q. Do you know as to the use of the level—the four-hundred—level—do you know whether this has been used between the five hundred and twenty and one hundred and eight foot planes?

Thereupon defendant objected to the said question for the reason that the same was irrelevant and immaterial, and that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and is not an action to recover for the use of levels constructed by the defendant in its own property.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant then and there duly excepted.

A. Yes, sir; it has. I have seen them using it within the past three weeks and prior to that time. They were using it the first time I entered the mine, which was in 1892–'93 or '94. The
43 level is drifted through the Drum Lummon vein, and runs between the lines of the plane claimed by plaintiff.

Cross-examination:

There was from one hundred to one hundred and twenty-five pounds of samples taken in block 8. We divided the stopes up into sections and cut across the whole stope, and gathered the material on canvas. We sampled both the roof and base of the stopes in this manner. This sample gave us, 4 oz. in gold per ton and 8.8 oz. in silver.

Block 9 was surveyed several years ago from the twenty-foot level. We did not cross-section it at this time. We took it from our notes, as we had cross-sectioned it before. The survey was made, I think, in the fall of 1894, about the time an injunction was granted to prevent the sinking of the apex shaft. There was no one working in block No. 9 when the survey was made. I believe the defendant company had been enjoined from working. Of my own knowledge I did not see the ore in block 9 being mined. I don't know absolutely. I know that somebody outside of our company stoped that ground out. We did not do it, and when I went up there I found it had been done. I do not remember that I saw the men working there. I may have seen them, but I do not remember it, but I know it was done. I sampled it; I took three sacks away; they weighed in the neighborhood of eight pounds each. From this we got the average of $161.10. It is very rich ore. It was taken from the Montana Company's apex shaft.

Block 10 was surveyed in 1894. Part of it was surveyed
44 since July 5—that was the north end of it, in the neighborhood of thirty feet. None of the upraise is in block 10. Block 10 was run by the defendant company. I have been through the level and seen the men at work.

I never went into the Nine Hour ground, except by permission of the court and under its order. On block 10 I could not get any samples. I took my samples from the nearest point. The nearest available point is one hundred feet up the winze, where the ore is ex-

posed. It is within that, probably eighty-five or ninety feet, I think. I took the ore out through the lagging. I took about 8 pounds, for this sample. It went $127.14. The winze at the point where the sample was taken was from high-grade ore. It carried 6.4 ounces in gold and 4.8 ounces in silver. I took no samples from the north end of block 10, nor from any point immediately above it. The sample was taken about eighty feet above and above the middle or southern portion. I did not examine the level to see if I could find any ore, because that would have taken too much time. I could not get at the ore as well below as I could above. I could not get at what I believed was the ore body, the rich ore which had been taken out, and I wanted to get the nearest thing to approximate to that ore. I saw some ore in the northern portion of the east side of the level in block 10 when I was there. I don't know the quantity. It was an irregular mass in the eastern portion of the one hundred and ninety foot level. There was three or four feet of it in height, and a foot or two in width, the whole length. The level was in low-grade ore for eleven feet. The ore had been removed, though—the good
45 ore had been removed and taken out, but I took no samples of it. Mr. Hand did. This was in 1894. There is six hundred and ten feet of the apex of the Drum Lummon lode lying between the lines of the planes claimed by plaintiff. From the one hundred and eight foot plane northerly the extreme limit of any of the several blocks claimed to be extracted is fifty-five feet.

Plaintiff also called and had sworn one WILLIAM JENKINS, who testified substantially as follows, to wit;

I have been a miner for about twenty-five years. I have worked for the St. Louis Company between six and seven years. I helped sample block No. 8. We had a canvas and the sample was taken across the face of the stope. We spread the canvas down and picked off the ore on the canvas. I helped sack it. We took samples from block 9 and 10. These blocks are on the Drum Lummon vein.

The plaintiff also called and had sworn WALTER PROCTOR JENNEY, a witness of lawful age, who testified substantially as follows:

I am a mining engineer and consulting geologist. I have been employed in that business for thirty years. I have made an examination of the Drum Lummon vein. I have given probably twenty days to the examination and field-work. I have examined the openings on the St. Louis and most of those on the Nine Hour claim. I was shown the discovery point of the St. Louis.

Whereupon the plaintiff asked the witness the following question:

46 Q. Is it connected with the vein?

To which question the defendant objected as being immaterial and irrelevant, and that there is no allegation in the complaint with reference to the discovery vein of the St. Louis Lode mining claim, and no issue in the pleadings with reference thereto.

But the court overruled such objection and permitted the witness

to testify, to which ruling of the court the defendant then and there duly excepted.

A. It is connected with a vein named the discovery vein. It is developed southerly by the Transcontinental tunnel to a point approximately, as shown upon the map, ninety-five feet from the south end of the claim, and it is in ore all the way. It is a strong vein at the face. The dip is nearly vertical, or fifteen at most from the vertical. It is a strong vein. It runs in the direction of the St. Louis end lines. I have examined the Drum Lummon vein. A part of it, approximately six hundred feet, is within the St. Louis claim, within the ground here described. The hanging wall passes out exactly where the one hundred and eight foot plane is cut, cutting the east side of the St. Louis claim as now possessed, that is, the west side line of the thirty-foot strip. I have been in the stopes mentioned. I was in stopes 8 and 10. I cannot now place myself in regard to stope 9. I probably passed through there. They are included within the walls of the Drum Lummon vein and are a part of that vein.

WILLIAM MAYGER was recalled and testified as follows:

47 The ore in block 8 was taken out by the defendant Montana Mining Company between now and a year ago. The ore in block 9 was extracted years ago, between 1893 and 1894, and it was done by The Montana Mining Company, the defendant. Block 10 was extracted also by the Montana Company about the year 1894. The ore in block 11 was extracted during the last year. I fix these things by the various orders issued by this court, granting us the privilege of going in there and making surveys and examinations. I am satisfied that all this work from the one hundred and ninety — level up was done by the Montana Mining Company since 1893.

Cross-examination:

No. 8 was mined last fall. I got out an injunction and restrained them from converting that ore to their own use, and I think the ore is stored subject to the instructions of this court. The court holds it, I believe. This applies also to block 11. I have seen persons at work in block 9. They were employés of the Montana Mining Company. I cannot give their names. The Montana Company's apex shaft was first commenced. We commenced ours three or four days afterward, possibly the next day. We extended our twenty-foot level through until it cut into the Montana Company's apex shaft. We cut it about thirty feet from the top. The ore in block 9 was taken out between the commencement of two injunction suits, but there was one of the suits we brought to stop the sinking of

48 the apex shaft. The side of the stope that was taken out was probably about twenty feet long along the level, six feet wide and fourteen to sixteen feet high. The ground there is not all caved. It is not caved on the end adjoining the St. Louis Company. You can get in the stope now. I looked in about two weeks ago. Some of the ore from block 9 may have crumbled and fallen down, but it did not fall on our side. Whatever fell on our side is there still.

On one occasion when I was in the one hundred and ninety foot level with Mr. Bayliss and Mr. Burrell they showed me a pile of ore that had been removed from north of the one hundred and ninety foot level to a point in the level south of the Nine Hour shaft. I examined it, but I did not take samples of it. I noticed that it carried more or less copper stain, and that was sufficient in my judgment to indicate it to be good ore.

Thereupon plaintiff rested.

The defendant, to maintain the issues on its part, read in evidence a deed from the Montana Company, Limited, to the Montana Mining Company, Limited, mining deed dated the twenty-seventh day of July, 1893, between the Montana Company, Limited, a corporation, and Francis William Pixley, of London, England, by Rawlinson Tenant Bayliss, their attorney-in-fact, parties of the first part, and the Montana Mining Company, Limited, a corporation, etc., party of the second part, consideration six hundred and sixty thousand pounds sterling, whereby the parties of the first part have
granted, bargained, sold, remised, released and forever quit-
49 claimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim, unto the said party of the second part, and to its successors and assigns forever, all and singular that quartz lode mining claim, mill site and premises situate, lying and being near the town of Marysville in the county of Lewis & Clarke and State of Montana, more particularly described as follows, to wit:

As that certain other lode mining claim, known and called the Nine Hour Lode mining claim, the same being designated in the United States patent therefor as lot No. 63 in township No. 11, north of range 6 west, and designated in the records of the surveyor general as survey No. 1705.

(Signed) THE MONTANA COMPANY, LIMITED, AND
FRANCIS WILLIAM PIXLEY,
The Liquidator Thereof,
By RAWLINSON TENANT BAYLISS,
Their Attorney-in-fact.

Duly acknowledged. Duly filed and recorded July 27, 1893.

Defendant likewise offered and read in evidence the injunction in case numbered 538 and the modification thereof, which is as follows:

(Title of Court, Title of Cause.)

Injunction.

The President of the United States to the Montana Mining Company, Limited, its servants, agents, and employés, Greeting:

Whereas, it has been represented to us in the circuit court
50 of the United States for the ninth circuit, district of Montana, that you are about to and threaten to enter into and upon

that certain portion of the lode, ledge or vein, known as the Drum Lummon lode, situated in what is known as the St. Louis mining claim, in Lewis & Clarke county, Montana, said mining claim being designated and described in the United States land office as lots 54 and 55 A, township 11 and 12 north, range 6 west, as is included between two vertical planes drawn parallel to the end lines of the St. Louis Lode mining claim as follows: The northernmost of said planes is drawn so as to intersect the point of intersection of the east side line of the St. Louis Lode mining claim with the west side line of the compromise ground or thirty-foot strip, said point being located on the east side line of the said St. Louis Lode mining claim, south twenty-one degrees fifteen minutes west, distant one thousand thirty-two and seven-tenths feet from corner No. 1 of St. Louis Lode mining claim; the other or southerly of said planes is drawn so as to intersect the west side line of the compromise ground or thirty-foot strip, at a point one hundred and eight feet south, fifty degrees fifty minutes west from the point of intersection of the east side line of the St. Louis Lode mining claim, with the west side line of the compromise ground or thirty-foot strip hereinbefore referred to, including the whole of said vein, ledge or lode included between said vertical planes on its dip throughout its entire depth, although the same may depart beyond the vertical planes passed through the side lines of the St. Louis Lode mining claim.

51 And that you are about to and threaten to mine and extract the ores, minerals, quartz, rock and earth therein contained, and to remove the same and to convert it to your own use.

Now, therefore, you, the said Montana Mining Company, Limited, your agents, attorneys, servants, employés and workmen and each and every of you, are strictly commanded and enjoined, under the pains and penalties which may fall upon you, and each of you, in case of disobedience, that you forthwith, and until the further order, judgment and decree of this court, desist from entering into and upon the said lode, vein or ledge, between the planes aforesaid, or any part thereof, although the same may in its dip pass beyond a vertical plane drawn through the side lines of St. Louis mining claim, or from working, mining or removing any ores, quartz, rock or mineral therein contained, or disposing of, treating and reducing any ores heretofore removed or extracted from said premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of this court, the twelfth day of December, 1898, and in the one hundred and twenty-third year of the Independence of the United States of America.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, *District of Montana.*

I hereby certify that I received the within injunction on the fourteenth day of December, 1898, and personally served the

52 same on the fourteenth day of December, 1898, on Montana Mining Company, Limited, by Alex Burrell, general man-

ager of said defendant company named therein, personally, at Marysville, in county of Lewis & Clarke, in said district, by delivering to and leaving with each of said defendants a copy thereof, together with a copy of the complaint duly certified.

Helena, Dec. 15, 1898.

J. P. WOOLMAN,
United States Marshal,
By M. H. HALL, *Deputy.*

(Title of Court, Title of Cause.)

Order Modifying Temporary Injunction.

This cause coming on this day to be heard, on the application of defendant for a modification of the temporary injunction order heretofore issued in the said cause, so as to permit the timbering of a drift run by the defendant into what is known as the compromise ground at the bottom of the plaintiff's winze, near its eighty-five-foot level, and also so as to permit the defendant to remove and store the ore taken from the said compromise ground now in the defendant's chutes, supported by the affidavit of William M. Phillpotts, and it appearing therefrom that the modification asked for should be granted, and everything being fully understood and considered.

Now, therefore, it is ordered and decreed that the said temporary injunction order heretofore issued in the said cause on November 19, 1898, be and the same is hereby modified so as to permit the said defendant company to timber, in a good and substan-
53 tial manner, the drift run by the said defendant for a distance of about twenty-eight feet southerly from the south end of plaintiff's winze, at or near its eighty-five-foot level, so as to prevent the hanging wall of the vein at said point from caving in, and to preserve the said drift from injury from caving.

And it is further ordered that the said injunction order be further modified so as to permit the defendant company to remove, from the chutes running from the above-described drift down to the defendant's four-hundred-foot level, the ore now contained therein as set forth in said affidavit, and to store the same in a safe and convenient place where the same shall be always subject to the further order of this court, and that upon removing the said ore the defendant shall file with the clerk of this court a true and correct statement of the amount of ore so removed, and the place where the same is stored.

It is further ordered that the said temporary injunction order, subject to the foregoing modification, be and the same is hereby continued in force until the further order of this court.

Dated November 26, 1898.

HIRAM KNOWLES, *Judge.*

Defendants called and had sworn DAVID HERRON, a witness of lawful age, who testified as follows:

I reside at Marysville. I am surveyor for The Montana Mining Company, Limited, the defendant. I am familiar with the works of the Montana Mining Company in and about the points
54 where the one hundred and eight foot line crosses the compromise ground, and I am familiar with those portions of the ground testified to by the witness Keerl and the witness Parks as blocks 8, 9, 10 and 11. I have made a survey of the ground and a map of it.

Whereupon the witness produced map marked Defendant's Exhibit No. 3, which said map was offered and received in evidence, and is as follows, to wit (here insert map):

The portions colored blue in the longitudinal section are the stopes of the defendant, and those colored red are the stopes of the plaintiff. The line A B is the projected end line drawn parallel to the end lines of the St. Louis claim. The line C D is the projection of the west boundary line of the thirty-foot strip. The portion of the map left not colored is the ground not stoped.

Defendant likewise called and had sworn one C. W. GOODALE, a witness of lawful age, who testified as follows:

I am by profession a mining engineer. I am at present superintendent of the smelter of the Boston & Montana Company at Great Falls. I am familiar with the ground here in controversy. I first visited the Nine Hour workings in April and May, 1893. I first saw the Montana Company's apex shaft in June, 1893. At that time it was about thirty or thirty-five feet deep. At the time I first saw it no connection had been made with the plaintiff's twenty-foot level, but when I saw the ground again about the twenty-first of September the level had been driven into the shaft and a brattice or bulkhead had been put in on the westerly line of the com-
55 promise ground. I have gone down the apex shaft to the lower workings upon the compromise strip and upon the Nine Hour at different times. I was in the one hundred and ninety-foot level in April or May, 1893. On my return from the East, about the twentieth of September, the drift in this level had been extended about thirty-five or forty feet north from where it was when I first saw it. It was the ordinary size of a mining drift—about seven feet high and four and a half or five feet wide. I examined the material which came out of that drift. It was a very low-grade quartz or vein matter, carrying no copper stain. There was no stoping done in the level, but a little overcutting was done and timber put in to prevent it from caving. I was in this level a few days since. There was quartz in the back of the drift, a very low-grade looking material. There would be no difficulty in getting a sample from it of the material in the drift, and the material that could be obtained would be a fair average sample of what came out of the drift. The pay chutes in the Drum Lummon trend in a southerly direction. A sample taken from a point in the winze one hundred feet above the one hundred and ninety foot level would

not fairly represent the material taken out in running the level. It would be in much higher-grade ore. At the point where Prof. Parks says he took the sample, the ore is of high grade, while in the one hundred and ninety foot level it was poor.

56 Cross-examination:

I made the affidavit which you now show me sworn to on September 23d, 1893. I made this statement: "I have made a careful examination of the stoping done by the said Montana Company, Limited, and its predecessor in interest in the Nine Hour ground, and while there is no direct connection between the said stoping and the said shaft, called the Montana Company's apex shaft, I am quite satisfied that no ore has been stoped from any ground lying to the north of the line drawn through a point where the strike of said lode probably crosses said compromise line, parallel with the south end line of plaintiff's said St. Louis Lode mining claim." The point at which I testified according to this affidavit that no work was done would be north of where the line goes out now. The point where I thought the vein passed out at that time was twenty feet, more or less, from the Montana Company's apex shaft and to the north of the one hundred and eight foot line as now drawn down.

Redirect examination:

I last examined block 9 on the seventh of August, this week. I climbed up from the eighty-five-foot level and above the forty-six. I climbed up on the brattice and caved ground and identified the top of this brattice which has been described. I climbed up to the surface, and it is my opinion that the block called block No. 9 has not been removed; that it is sti-l there. There is certainly a
57 triangular piece of ground or cone there. I climbed up to the surface and identified the brattice described, and from what I have seen on the north side of the Montana Company's apex shaft I do not believe that material was used. I think the pillar of ground above the twenty-foot level of the St. Louis Company and between the red stope shown on the Montana Company's map on the apex shaft and extending to the face has not been removed.

Defendant also called and had sworn ALEXANDER BURRELL, a witness of lawful age, who testified as follows:

I am a miner. I have been engaged in that business for about twenty-five years. I have been connected with the Drum Lummon since 1888. I was mine superintendent up to April, 1897, since which time I have been manager. We commenced sinking the Montana Company's apex shaft on the first day of June, 1893, and sunk it down to a depth of about thirty-five feet, when we were obliged to stop from the fact that the St. Louis Company's eighteen-foot drift was approaching so near that the shots made it not safe to work in the shaft. On the twenty-fifth of June they broke through into our apex shaft. We then stopped them from coming in, and

after they had knocked a hole through we put in a brattice within about a foot of the line. We left about a foot to be sure. We also put in two short stulls. That is all the stoping we did there, and we left the material in the bottom of the shaft and on the floor of the drift. At that time no stoping of the ground had been done
58 by the Montana Company, or by anybody, north of the apex shaft along the line of the compromise ground. I have had continuous control of the operations of the property since and no ore has been removed by anybody over whom I had control north of the apex shaft and within the ground which plaintiff calls its block No. 9. The ground has caved in and dropped into the stope, part on one side of the line and part on the other. I think the greater part is on plaintiff's forty-six-foot level. No ore has been taken by either of the companies with which I have been connected out of what plaintiff claims as block No. 9. In block No. 8 we commenced work immediately after the decision of the Supreme Court of the United States granting us the title to that strip of ground with all the mineral therein contained, which was about a year ago—probably in October or November last. I do not know whether we worked any ore from blocks No. 8 and 11 prior to the service of the injunction. That would have to be determined by the amount left in the upraise that is not taken out, but I have estimated that possibly we milled forty or fifty tons of that ore before the order reached us. The ore that was in the chute we were allowed to remove and bring to the surface, and I have rendered a statement of that ore to this court. There was about sixty tons of it. The balance of the ore that came out of blocks 8 and 11 is in the upraise above the one hundred and ninety foot level. It is in the St. Louis winze sunk from their forty-six-foot shaft to the eighty-five-foot, as continued down by us. The ore is in that winze lying along the bottom of the drift or raise—it is about half full.
59 Block No. 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six-foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level as driven in what is called block No. 10 was of a regular size—six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had no mineral value, and was not worked in the mill. It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south. Starting at the top and going at right angles to the dip the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level, by any means. You might as well go across the range and get a piece of ore as to go there, because of the character of the ground. The trend of the ore body is to the south and the stopes on the one hundred and ninety foot level as

you go northerly leave the pay ore. There is no pay ore over the back of the level at the edge of tke stope. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken
60 from the drift, because the top is nearer the bottom of the southern trend than the bottom of the drift, corresponding to its height *h*. There has never been any stoping done in that part of the one hundred and ninety foot level known as block 10. The custom is to take out samples every morning from all places where they are working in the mine, tie them up and mark them and send them to the assay office to know whether ore or waste; there was no exception in this case.

Cross-examination:

The material that came out of block 10 was deposited probably one hundred and eighty or two hundred feet south of the point in the level where it came out. That part of the mine has caved and it probably went down in the waste cave or old original stope. We carried the ore from block No. 10 to the south of the Nine Hour shaft; it is caved down into the works of the Nine Hour. The same disposition was made of the material that came out of block 11 as that which came out of block 8. I know where the two-hundred-foot raise is. We did not stope to the north at that point.

Defendant also called and had sworn JOHN HERRON, a witness of lawful age, who testified substantially as follows:

I am a civil engineer by occupation. I have followed that business for about twenty years. I was for five and a half years at Marysville in the employ of the Montana Mining Company.
61 While there I became acquainted with the mining claims in controversy. I know the Montana Company's apex shaft, plaintiff's twenty-foot level, and I know that the apex of the Drum Lummon lode is at that point. There has been no work done by the Montana Company above the twenty-foot level north of its apex shaft, unless it was a little timbering. There was no stoping done there and no ore taken out there. I am acquainted with the one hundred and ninety foot level in defendant's ground. While the level was being run northerly from the one hundred and eight foot line I was in it nearly every day. The material which came out was waste, and was carried south into the level and dumped in the bottom of the drift. None of it was worked.

Defendant also called and had sworn one WILLIAM M. PHILLPOTTS, a witness of lawful age, who testified substantially as follows, to wit:

I am a mining engineer. I have been with the defendant company for the last five years. I am acquainted with the one hundred and ninety foot level. It is about thirty-five feet long; about twenty-seven or twenty-eight feet of it at the north end is open. The southerly ten or twelve feet of it is filled up. I gained access to it

from plaintiff's eighty-five-foot level. I went down the raise from that level into the one hundred and ninety foot level. There is quartz and vein matter in the back of the level. I took a sample of it, or rather I took six samples. I took the first one twenty-three feet south of the north face. The second one is a sample of
62 the pile of ore that lies in the drift; the third one is a sample taken sixteen feet south of the north face; the fourth one about twelve feet south of the north face, and the fifth one is six feet south of the north face, and the last one is a sample of the face.

(Here the witness produced the samples for exhibit to the jury.)

I am an assayer and I assayed these samples. No. 1 assayed .12 oz. in gold and 1.6 oz. in silver—value in gold, $2.48; silver, $.96; total, $3.44. No. 2 contained .11 oz. in gold and 1.9 oz. in silver; total value, $3.41. No. 3 contained .12 oz. in gold, 1.5 oz. in silver; total, $3.38. No. 4, trace of gold and .7 oz. silver; total value, $.42. No. 5, a trace of gold and 1.5 silver; total value, $.30. No. 6, .02 oz. gold and .8 oz. silver; total value, $.89.

I heard the testimony of Mr. Parks and heard him describe the point from which he took the sample that he assayed as a sample of the contents of this block No. 10. It would not represent the value of that block at all, as it is not taken anywhere near that point.

Thereupon defendant rested.

Rebuttal:

The plaintiff thereupon offered in rebuttal the complaint and exhibit attached thereto, the answer the findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein the Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant,
63 which papers have been offered in evidence heretofore in this case and marked Plaintiff's Exhibit No. 2, are as follows, to wit:

(Title of Court, Title of Cause.)

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges:

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana, by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, The St. Louis Mining & Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral-land claimants, were the owners of, in possession of, and law-
64 fully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode mining claim, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,884.5 feet, together with all the mineral therein contained; that thereafter, in causing to be surveyed for a patent his St. Louis Lode mining claim, the above-named defendant, Charles Mayger, had
65 wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part of the Nine Hour Lode mining claim, so the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession and entitled to the possession thereof. And thereupon said defendant, Charles Mayger, having wrongfully made application in the United States land office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis mining claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke, to determine the right to the possession of said premises. In the said action so commenced as aforesaid the said

William Robinson and James Huggins were plaintiffs and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject-matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said
66 St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A," and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said district court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed; that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis mining claim, and thereafter an United States patent was duly issued to him for said St. Louis Lode mining claim as surveyed, and included therein that portion of the Nine Hour Lode mining claim above particularly mentioned and described, but no notice
67 was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1889. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode mining claim.

IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D.

1893, demanded of and from the said defendants that they make, execute and deliver a good and sufficient deed to it of and for the premises above mentioned and described, in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by said plaintiff or
68 any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893, for an alleged consideration of one thousand dollars, he made, executed and delivered — of and for said premises to the said defendant, the St. Louis Mining & Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed the said defendant, The St. Louis Mining & Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining & Milling Company of Montana has instituted a number of suits in the circuit court of the United States within and for the district of
69 Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining & Milling Company of Montana, it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that

plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5, 1894, before W. E. Cullen, Jr., notary public, Lewis & Clarke county, Montana.

70 EXHIBIT "A."

Mayger
to
Robinson *et al.* } Deed.

Know all men by these presents: That I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators and assigns, firmly by these presents.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in
the United States land office at Helena, Montana, for a
71 patent to the St. Louis lode claim described therein and
situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to such application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Lode claim and the Nine

Hour Lode claim, and particularly described as follows, to wit: Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Load claim, between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary, between corners 1 and 2, 60.6 feet to corner No. 2 of the St. Louis lode, 40.031 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the boundary of St. Louis lode, between corners 3 and 4, 30 feet to a point; thence north
50 degrees 28 minutes east along the line parallel to the
72 boundary line of the St. Louis lode, between corners 2 and 3,
230 feet to the point of beginning, including an area of about 12,844.50 sq. ft., together with all the mineral contained therein; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8, 1884, at 3 a. m.

(Title of Court, Title of Cause.)

Answer.

And now come the defendants herein and for answer to the complaint of plaintiffs:

I.

Admit that the said William Robinson, James Huggins and
Frank P. Sterling, Warren De Camp and John W. Eddy were
73 at the date mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then or at any other time, or that the same was or is a part of the Nine Hour Lode claim, and aver that the same was and is a part of the St. Louis Lode mining claim, designated and known as such, and embraced and included in the United States patent ob-

tained by the said defendant, Charles Mayger, for said St. Louis Lode mining claim, as hereinafter set forth.

Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis mining claim over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis mining claim as originally located included and embraced the said *locus in quo* and every part thereof at and prior to the location of said Nine Hour Lode claim, and that the said Charles Mayger and his successors in interest hath ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles
74 Mayger wrongfully made application in the United States land office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis mining claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling or agreeing upon the boundary line between the said Nine Hour Lode mining claim and said St. Louis Lode mining claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode claim owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins and Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of said bond,
in that it obligates the said Charles Mayger to execute a good
75 and sufficient deed to Robinson alone, and avers the fact to be the said original bond obligated Charles Mayger to execute a deed on demand to said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that said Charles Mayger obtained a patent for said St. Louis Lode mining claim, but deny that it contained any portion of said Nine Hour Lode mining claim, and aver that the said plaintiff

and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were all aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever had been, in possession of said premises or any part thereof, except the small portion aforesaid, or that they or either of them used and enjoyed the same, or any part thereof, except the small portion aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode mining claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode mining claims, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a
76 deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them, at the time of the making the deed by the said defendant Mayger to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the said plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon the title of plaintiff, or that it is necessary they or either of them should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode mining claim included said premises as alleged, no such transfer or conveyance is necessary for any purpose.

77 And these defendants, for further answer to the complaint of plaintiff, show unto this honorable court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise

to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid.

That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendent, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his St. Louis mining claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto, and had and held the possession thereof.

That *that* said defendant, The St. Louis Mining & Milling Company of Montana, ascertaining and hearing that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purpose of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsection 41, and section
78 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this honorable court that if it shall appear the said plaintiff is not the owner of said premises by any of the conveyances mentioned in the said complaint, or the title by it so pleaded, that the same be decreed null and void, and that the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified. Filed January 2, 1895.

(Title of Court, Title of Cause.)

Finding of Fact by the Court.

I.

That the plaintiff and the defendant, The St. Louis Mining & Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

79 II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "compromise ground," which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode mining claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States land office at Helena, Montana, for a patent to the said St. Louis Lode mining claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the district court of the third judicial district of Montana, within and for the county of Lewis & Clarke; that on the seventh day of March. A. D. 1884, the said Robinson, Huggins and
80 Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto that all of the ground

lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode mining claim.

81 VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligeees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim.

IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of the said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

82 X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said compromise strip to his codefendant, The St. Louis Mining & Milling Company of Montana, but at the date of said conveyance, the said defendant, The St. Louis Mining & Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

Conclusions of Law.

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

83 II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title or interest of any kind or character in or to the said compromise ground, or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

(Title of Court, Title of Cause.)

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn appearing for the defendants. A jury having been expressly waived by the parties, the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of said defendants, and the argument of counsel, and after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner

84 of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is

Ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, The St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee-simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said defendant, The St. Louis Mining & Milling Company of Mon-

tana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis & Clarke and State of Montana, the same shall have the force and effect of a conveyance of
the said title from said defendants to the said plaintiff; that
85 the said defendants and all persons claiming under them or
either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees and 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have
86 and recover from the said defendant its costs in this behalf
sustained, taxed at the sum of — dollars.

And that the plaintiff have execution therefor.

June 1, 1895.

HORACE R. BUCK, *Judge.*

To which the defendant objected for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant in this case, and for the further reason that the evidence was not material to any issue made by the pleadings in the case; that there being no ambiguity in either the bond or deed attached as an exhibit to defendant's answer herein, there was nothing for the court to construe.

It was stipulated by counsel for both parties that any objection to such papers based upon the ground that the same were not certified to or authenticated as required by law should be waived.

But the court overruled such objection. To which ruling of the

court the defendant then and there excepted, and the papers were admitted in evidence for the purpose of enabling the court to construe the deed, and marked "Plaintiff's Exhibit No. 2." The deed referred to in the judgment is in the same form as the copy of the deed in the answer of the defendant, and is omitted for sake of brevity.

And the foregoing being substantially all of the evidence given or offered to be given in said cause, and both parties having rested, the defendant asked the court to instruct the jury as follows:

87 "The parties to this action having by agreement settled the boundary-line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground, with the easterly boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode and lying between said lines and the northerly projected end line, as claimed in the complaint."

But the court would not and did not give such instruction, but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

Thereupon the defendant requested the court in writing to charge the jury as follows, to wit:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the minerals therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex.

88 The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim."

But the court would not and did not give the said instruction, but marked the same "Refused," to which ruling of the court in refusing to give such instruction the defendant then and there duly excepted.

The defendant further thereupon requested the court in writing to charge the jury as follows, to wit:

"If you believe from the testimony in this case that the defendant, though it mined the ore in what the plaintiff has designated as

blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

But the court would not and did not give such instruction, but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

The defendant further requested the court in writing to instruct the jury as follows, to wit:

"You are instructed that this is an action for damages occasioned by trespass, and the taking and carrying away of
89 ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand, the evidence is clear and uncontradicted that the defendant had and still has actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

But the court would not and did not give the said instruction, but marked the same "Refused," to which ruling of the court and its refusal to give such instruction the defendant then and there duly excepted.

The defendant further requested the court in writing to instruct the jury as follows, to wit:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore
has been taken by the defendant, of which it is the owner,
90 but before it can be entitled to recover it must show the market value of the ore so taken, and, in determining the value of the ore so taken, you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and of milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if, from the evidence, you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

But the court would not and did not give the said instruction,

but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

And thereupon the court charged the jury, among other things, as follows, to wit:

"Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and the 108."

To the giving of which said instruction the defendant, before the going out of the jury, objected, for the reason that under the issues the said instruction was irrelevant and immaterial.

91 But the court overruled such objection and gave such instruction, to which said ruling of the court the defendant then and there duly excepted.

And the court likewise, among other things, instructed the jury as follows, to wit:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

To the giving of which said instruction, the defendant then and there objected, for the reason that there was no evidence that the defendant had prevented the plaintiff from ascertaining the true value of any of the ore, and that said instruction was misleading to the jury, and does not correctly state the law applicable to the case therein supposed.

But the court overruled such objection and gave the said instruction to the jury, to which ruling of the court the defendant then and there excepted, and now presents this its bill of exceptions, and prays that the same may be signed, sealed and made a part of the record in this case.

HIRAM KNOWLES, *Judge.*

92 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Settling Exceptions.

This cause having been brought on regularly before the court on this twenty-sixth day of August, 1899, upon the application of the defendant, for the settling and certifying of its proposed bill of exceptions, lately filed herein, and the amendments to said proposed bill of exceptions by the plaintiff, and all of said amendments so

far as allowed by this court having been embodied in a transcribed copy of said proposed bill of exceptions, composed of the foregoing pages, numbered 1 to 65 inclusive.

Now, therefore, on motion of Messrs. Cullen, Day and Cullen, the defendant's attorneys, it is ordered that the said proposed bill of exceptions, as amended and transcribed, embraced in the foregoing pages, be and it hereby is settled as the true bill of exceptions for this cause, and that the same as so settled be now and here
93 certified accordingly by the undersigned, the judge of this court, who presided at the trial of this cause, and that said bill of exceptions as so certified be filed by the clerk.

Aug. 28, 1899.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Bill of exceptions. Filed Aug. 28, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the twenty-eighth day of August, A. D. 1899, a petition for a writ of error was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendants.

Petition for Writ of Error.

The Montana Mining Company, Limited, the defendant in
94 the above-entitled cause, feeling itself aggrieved by the verdict of the jury and judgment entered on the sixteenth day of August, A. D. 1899, comes now by Messrs. Cullen, Day & Cullen, its attorneys, and petitions the court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the d-termination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

August 28, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendants.

At a stated term, to wit, the April term, A. D. 1899, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of Montana, held at the court-room in the city

of Helena, on the twenty-eighth day of August, in the year of our Lord, one thousand eight hundred and ninety-nine.

Present: The Honorable Hiram Knowles, circuit judge.

95 ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Allowing Writ of Error.

Upon motion of Messrs. Cullen, Day & Cullen, attorneys for the defendant, and upon filing a petition for writ of error and assignment of errors.

It is ordered that writ of error be and hereby is allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at twenty-five thousand dollars.

August 28, 1899.

HIRAM KNOWLES, *Judge.*

And on said twenty-eighth day of August, 1899, an assignment of errors was filed herein, being as follows, to wit:

96 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Comes now the defendant, The Montana Mining Company, Limited, plaintiff in error, by Cullen, Day & Cullen, its attorneys, and says that the record and proceedings in the above-entitled cause show there is manifest error in this, to wit:

I.

That the court erred in overruling the defendant's objection to the introduction of any testimony on the part of plaintiff, for the reason that the second amended supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

97 II.

That the court erred in permitting the witness, William Mayger, to testify that the discovery vein of the St. Louis mining claim ran more parallel with the location of the St. Louis Lode mining claim

than in any other direction, for the reason that the said testimony was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis Lode mining claim, and there being no allegation in the complaint as to the course or direction of said vein.

III.

The court erred in admitting any and all of the testimony offered with reference to the discovery vein of the said claim, for the reason that the same was irrelevant and immaterial under the pleadings.

IV.

The court erred in permitting the witness James S. Keerl to testify that the lines representing the planes drawn upon Plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis mining claim, for the reason that the same was incompetent and immaterial, it not having been established which were the end lines, or which the side lines of the St. Louis claim.

V

The court erred in permitting the witness James S. Keerl to
98 give the dimensions of blocks 8, 9, 10 and 11, which were situated north of the one hundred and eight foot plane, as shown upon Plaintiff's Exhibit No. 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary of the thirty-foot strip intersects it, for the reason that the same was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground, known as the "compromise ground," together with all the mineral therein contained, and alleged in the answer that the said "compromise ground" had been conveyed by the plaintiff to the defendant in pursuance of a bond for a deed, describing the compromise ground by metes and bounds and conveying the same to the defendant, "together with all the mineral therein contained," which said bond and deed, being attached as exhibits to the answer, were not denied, but specifically admitted by the replication, and that therefore the plaintiff was estopped from claiming any mineral within the said compromise ground, and it appears in the testimony that the mineral about which the witness was testifying, was within the vertical lines of said compromise ground.

VI.

The court erred in permitting the witness John R. Parks to testify that the discovery vein of the St. Louis claim ran generally parallel to the side lines of said claim, for the reason that there was no issue made by the pleadings relative to the discovery vein of said claim.

99 VII.

The court erred in permitting the witness John R. Parks to testify to the contents of blocks 8, 9 and 10, for the reason that it appeared

from the testimony that the said blocks were in what was designated as the compromise ground, and that under the pleadings the plaintiff was estopped to claim any mineral found therein.

VIII.

The court erred in permitting the witness John R. Parks to testify that the four-hundred-foot level had been used by the defendant in the operation of its mine, for the reason that the same was irrelevant and immaterial, in that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and not an action to recover for the use of levels constructed by the defendant upon its own property.

IX.

The court erred in permitting the witness Walter Proctor Jenney to testify that the discovery point of the St. Louis Lode claim was connected with a vein called the discovery vein, and in permitting the said witness to describe the said vein, for the reason that the same was immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis Lode mining claim, and no issue in the pleadings with reference thereto.

100 X.

The court erred in admitting in evidence in rebuttal the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff, and the plaintiff herein was defendant, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed, attached as exhibits to defendant's answer herein, and therefore there was nothing for the court to construe.

XI.

The court erred in refusing to give the jury the following instruction requested by the plaintiff in error:

"The parties to this action having by agreement settled the boundary line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground with the easterly

101 boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines and the northerly projected end line, as claimed in the complaint."

XII.

The court erred in refusing to give the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendants upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim."

XIII.

The court erred in refusing to give the jury the following instruction:

102 "If you believe from the testimony in this case that the defendant, though it mined the ore in which the plaintiff has designated as blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

XIV.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action, the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein, from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the de-

fendant company, and possession of the place of trespass.
103 Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

XV.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

XVI.

The court erred in giving the following instruction during its charge to the jury:

104 "Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 520 and the 108."

XVII.

The court erred in giving the following instruction during its charge to the jury:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

Wherefore, the said Montana Mining Company, Limited, plaintiff in error, prays that the judgment of the circuit court of the United States for the district of Montana be reversed, and that the said circuit court be directed to enter an order setting aside the verdict and dismissing the said cause of action.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 291. (Title of court and cause.) Petition for writ of error. Order and assignment of errors. Filed August 28, 1899. Geo. W. Sproule, clerk.

105 And thereafter, to wit, on the seventh day of September, 1899, a bond on writ of error was duly approved and filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The St. Louis Mining & Milling Company of Montana, plaintiff above named, in the sum of twenty-five thousand dollars, to be paid to the said St. Louis Mining & Milling Company of Montana, its successors or assigns, to which payment, well and truly to be made, we *find* ourselves and each of us, jointly and severally, and our and each of our successors, firmly by these presents.

106 Sealed with our seals and dated the twenty-ninth day of August, A. D. 1899.

Whereas, the above-named defendant, The Montana Mining Company, Limited, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment entered in the above-entitled cause on the sixteenth day of August, 1899, by the circuit court of the United States for the district of Montana.

Now, therefore, the condition of this obligation is such that if the above-named Montana Mining Company, Limited, shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE MONTANA MINING COMPANY, LIMITED,
By ALEX. BURRELL, *General Manager.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By GEORGE L. RAMSEY, *Attorney-in-fact.*

Copy of Resolution.

That whereas, it is often necessary, in order to facilitate the business of the company in States other than Maryland, and in the Territories, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness;

107 Now, therefore, be it resolved, that the president, or one of the vice-presidents, and the secretary, or assistant secretary, be, and they are hereby authorized, to appoint one or more persons residing in the States other than Maryland, and in the Territories of the United States, to sign the name of the company as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding within any one of the said States or Territories, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the company to all intents and purposes, as if done by its duly authorized officers, and the company, through us, its board of directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, George R. Callis, secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the board of directors of the said company at a regular meeting thereof, duly called and held on the eleventh day of July, A. D. 1898, a quorum being present, as the same appears on the records of the company now in my possession and custody as secretary.

In witness whereof, I have hereunto set my hand and affixed

108 the seal of the said company, at the city of Baltimore, Maryland, this seventeenth day of April, A. D. 1899.

[SEAL.] GEORGE R. CALLIS, *Secretary.*

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers, a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and foregoing is a full and correct copy of the power of attorney, granted by the United States Fidelity & Guaranty Company, to George L. Ramsey, under date of April 17, A. D. 1899, together with certificate of authenticity, signed by Arthur C. Pierce, notary public; copy of the resolution by the directors of the United States Fidelity and Guaranty Company, and certificate of authenticity, signed by George R. Callis, secretary. I further certify that the power of attorney was filed in duplicate original, in the office of the

clerk of the supreme court for the State of Montana, and endorsed: "Filed May 18, 1899. Henry G. Rickerts, clerk of the supreme court, State of Montana;" and that it was also filed in the office of the clerk of the United States court, for the district of Montana, and endorsed: "Filed and entered, May 20, 1899. Geo. W. Sproule, clerk of the United States court, for the district of Montana."

109 In witness whereof, I have hereunto set my hand, and affixed my seal, at the city of Helena, Montana, this fifth day of September, 1899.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

Power of Attorney Granted to George L. Ramsey by United States Fidelity and Guaranty Company of Baltimore.

Know all men by these presents, that the United States Fidelity and Guaranty Company, a body corporate duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint George L. Ramsey, of the city of Helena, county of Lewis and Clarke and State of Montana, to be its true and lawful attorney, in and for the State of Montana, for the following purposes:

To sign its name as surety to, and to execute, acknowledge, justify upon, and deliver, any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding brought or pending within any of the counties of the said State.

It being the intention of this power of attorney to fully authorize and empower the said George L. Ramsey, to sign the name

110 of said company, and affix its corporate seal as surety to any or all of the said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully, and to all intents and purposes as if done by the duly authorized officers of said company, with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said George L. Ramsey may lawfully do in the premises by virtue of these presents.

In witness whereof, the said The United States Fidelity and Guaranty Company, pursuant to a resolution of its board of directors, duly passed on the eleventh day of July, A. D. 1898 (a certified copy of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal, duly attested by its president and by its secretary, this seventeenth day of April, A. D. 1899.

THE UNITED STATES FIDELITY AND GUARANTY CO.

[SEAL.]

JOHN R. BLAND, *President.*
GEORGE R. CALLIS, *Secretary.*

[Government revenue 25c. stamp.]

STATE OF MARYLAND, }
City of Baltimore. }

I, Arthur C. Pierce, a notary public, duly appointed and qualified, in and for the city and State aforesaid, hereby certify that on this seventeenth day of April, A. D. 1899, personally appeared
111 before me, John R. Bland, president, and George R. Callis, secretary, of the United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said corporation, and the individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of said corporation; and being by me each duly sworn severally and each for himself, did depose and say that they are the said officers of the said corporation, and that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said corporate seal, and their signatures as such officers, were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year above written.

ARTHUR C. PIERCE,
Notary Public.

[SEAL.]

112 *Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C., at the Close of Business June 30, 1899.*

Commenced business August 1st, 1896.

Assets.

Investments, stocks and bonds (market value)	$1,178,917.08
Collateral loans	338,681.25
Real estate	65,346.66
Cash on hand and in banks	311,450.90
Loans secured by mortgage	37,275.10
Advances on real estate secured by deeds	21,249.83
Furniture and fixtures	100.00
Agents' balances less commissions	100,779.02
Mercantile and attorneys' subscriptions in course of collection	15,535.98
Interest due and accrued	16,257.84
	$2,085,593.66

Liabilities.

Capital stock paid in cash	$1,500,000.00
Cash on deposit held as security for risks	43,902.93
Surplus and reinsurance reserve	541,690.73
	$2,085,593.66

JOHN R. BLAND, *President.*

ARTHUR C. PIERCE,
Assistant Secretary.

113 STATE OF MARYLAND, } ss:
City of Baltimore, }

On this first day of July, A. D. 1899, before me, the undersigned, a notary public in and for the city and State aforesaid, appeared John R. Bland, president, and Arthur C. Pierce, assistant secretary, of the United States Fidelity and Guaranty Company, who being by me severally duly sworn, did depose and say that they are such officers of said company, and that the above and foregoing is a true and correct statement of the assets and liabilities of said company, as they appear upon the books of the said company.

Subscribed and sworn to before me this first day of July, A. D. 1899.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

(Endorsed:) Title of court and cause. Bond on writ of error. Within bond approved Sept. 7, 1899. Hiram Knowles, judge. Filed Sept. 7, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the seventh day of October, 1899, a writ of error was duly issued herein, being as follows, to wit:

114 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Montana Mining Company, Limited, plaintiff in error, and St. Louis Mining & Milling Company of Montana, defendant in error, a manifest error hath happened, to the great damage of the said Montana Mining Company, Limited, plaintiff in error, as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, thirty days from the date hereof, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

115 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this the seventh day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

GEO. W. SPROULE,
Clerk United States Circuit Court
for the District of Montana.

Allowed by:

HIRAM KNOWLES,
United States District Judge.

Service of the within writ of error and receipt of a copy thereof admitted this ninth day of October, A. D. 1899.

E. W. TOOLE AND
THOS. C. BACH,
Attorney for Defendant in Error.

Filed October 9, 1899.

GEO. W. SPROULE, *Clerk.*

Return to Writ of Error.

The answer of the judges of the circuit court of the United States for the district of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States circuit court of appeals for the ninth circuit within mentioned, at the day
116 and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the court:

[SEAL.]

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the seventh day of October, 1899, a citation was duly issued herein being as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, State of California, thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein The Montana Mining Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

117 Witness the Honorable Hiram Knowles, judge of the United States district court for the district of Montana, this seventh day of October, A. D. 1899.

HIRAM KNOWLES,
United States District Judge.

Service of the within citation admitted and copy received this ninth day of October, A. D. 1899.

E. W. TOOLE AND
T. C. BACH,
Attorneys for Defendant in Error.

Filed October 9, A. D. 1899.

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the twenty-first day of October, 1899, a stipulation as to maps was filed herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Stipulation as to Maps.

118 It is hereby stipulated by and between the parties to the above-entitled action that the maps heretofore introduced in evidence upon the trial of the said action in the said court, and marked Plaintiff's Exhibit No. 1 and No. 1*a*, and Defendant's Exhibit No. 3, may be transmitted by the clerk of the said circuit court to the clerk of the circuit court of appeals for the ninth circuit, and by said clerk of said circuit court of appeals filed in the causes heretofore or about to be taken to the said circuit court of appeals on writs of error by the said plaintiff and defendant in the above-entitled action, and when so filed the said original maps may be used on the argument of the said writs of error with the same force and effect as if the said maps had been inserted in the record transmitted by the clerk in the said several writs of error.

Dated October 16, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff.
E. W. TOOLE AND
THOS. C. BACH,
Attorneys for Defendant.

(Endorsed:) No. 291. In the circuit court, United States district of Montana. St. Louis Mining & Milling Company *vs.* Montana Mining Company, Limited. Stipulation. Filed Oct. 21, 1899. Geo. W. Sproule, clerk.

119 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Montana*, } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of one hundred and seventeen pages, numbered consecutively from one to one hundred and seventeen, is a true and correct transcript of the pleadings, process, records, orders, judgment and all proceedings had in said cause and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of forty-three dollars and ninety cents, and has been paid by the plaintiff in error.

In witness hereof, I have hereunto set my hand and affixed the seal of said United States circuit court at Helena, Montana, this twenty-seventh day of October, A. D. 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

120 (Endorsed:) No. 567. In the United States circuit court of appeals for the ninth circuit. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining & Milling Company of Montana, defendant in error. In error to the circuit court of the United States for the district of Montana. Transcript of record. Filed Nov. 3, 1899. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

121 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error. } No. 567.

Filed May 14, 1900.

Arthur Brown and Thomas C. Bach, for the defendant in error; Chas. J. Hughes, and Cullen, Day & Cullen, for the plaintiff in error.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

The defendant in error, The St. Louis Mining and Milling Company, of Montana, was the plaintiff in an action brought against the plaintiff in error, The Montana Mining Company, Limited, for

trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim and the defendant owned the Nine Hour mining claim which adjoined it on on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the
122 owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two claims. At the time of applying for a patent, the locators thereof included in their survey a portion of the premises which were claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came on for trial, the suit was compromised. It was agreed that as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy, a strip thirty feet wide, to be described by metes and bounds, "together with all mineral therein contained." The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract. In the complaint in that suit, it was alleged that the contract had been made "for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim." A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof, a conveyance was executed by The St. Louis Mining and Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the thirty-foot strip by metes and bounds, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, etc." It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins, one
123 the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east, and a second vein apexing for a long distance within the claim and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to, there was conveyed to it from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had not only to its terms, but to the subject-matter involved and the surrounding cir-

cumstances, in order to ascertain the intention of the parties. Said the court in Richmond Mining Co. *v.* Eureka Mining Co., 103 U. S. 846: "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downwards through the dips of the veins or lodes, wherever they might go in their course towards the center of the earth." The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface.

The owners of the Nine Hour claimed nothing more than
124 that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed, was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed, are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St.

Louis claim intended by the compromise contract not only
125 to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights, rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would under the circumstances need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient. These words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining

claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein." Counsel for the plaintiff in error rely upon two decisions which, it is said, favor the construction which they contend for, the Eureka case, 4 Sawyer, 302, and Stinchfield *v.* Gillis, 107 Cal., 86. In the first case, two owners of several adjoining claims, had fixed and agreed upon a line running northerly for a fixed distance which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had by the terms thereof made so clear their intention to divide their claims by a vertical plane and to confine their mining rights to either side thereof, that there was no room for construction. In the case of Stinchfield *v.* Gillis,
it was held that if the locator of a mining claim should convey
126 a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court, p. 90, "All that we hold is, that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy, and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim rather than across, or that it dips in any given direction, and that for want of these allegations, the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the
allegation, however, that the defendant in error is the
127 owner of and in the possession of the St. Louis Quartz Lode mining claim, "and of the quartz, rock, and ore, and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apices of which

lie within the surface lines of the said fractional portion of said St. Louis Lode mining claim." It described the mining claim by metes and bounds, and shows that it is about fifteen hundred feet in length by nearly six hundred feet in width. The description closes with these words: "Said lots Nos. 54, and 55 A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined, lies east of the east side line of the claim. It alleges that the dip of one of the veins having a portion of its apex inside of the surface of the St. Louis claim, is to the east and dips under and beneath the thirty-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In Walrath *v.* Champion Min. Co., 19 C. C. A., 328, this court said: "The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extra-lateral rights to all the lodes that are thereafter found within the surface lines of the location." In Del Monte Mining
128 Company *v.* Last Chance Mining Company, 171 U. S., 89, it was said: "Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them, establish the limits beyond which he may not go in the appropriation of a vein on its course or strike, is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines." Upon the expressions of the Supreme Court just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error owns all the

precious metals contained in any vein or lode of mineral-
129 bearing rock through their entire depth whose apex is within the surface of the St. Louis Quartz Lode mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive but actual. Said the court in Iron Silver Mining Co. *v.* Cheesman, 116 U. S., 553: "It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment,' is one whose apex is found inside of his surface lines, extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location." In Pardee *v.* Murray, 4 Mont., 234, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court, p. 277: "The possession of the respondent was sufficient to maintain this action. * * * Possession of the surface of a mining claim location is possession of all
130 veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines." The case of Hugunin *v.* McCunniff, 2 Colo., 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode not connected with the first. The defendants afterwards took ore from the level and shaft which they retained. In trespass for the ores so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that throughout the length of the level retained by them, the defendants had actual possession extending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mines, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill

of exceptions to show that such ores had been returned or tendered to the defendant in error or in any way accounted for, nor was evidence offered for the purpose of definitely fixing the value of such ore so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired, to have
131 the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to or were left in the possession of the defendant in error, and to have submitted evidence of their value. But there is another answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not in its charge to the jury fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury.

Considering the whole record and all the assignments of error, we find no ground for which the judgment should be reversed, and it is accordingly affirmed.

(Endorsed:) Opinion. Filed May 14, 1899. F. D. Monckton, clerk.

132 United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error. } No. 567.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and entered May 14, 1900. F. D. Monckton, clerk.

133 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.
No. 567.

To the honorable the judges of the United States circuit court of appeals for the ninth judicial circuit:

Now comes the plaintiff in error above named, The Montana Mining Company, Limited, and complains that in the records and proceedings had in the said cause and in the opinion and judgment rendered therein on the 14th day of May, A. D., 1900, manifest error hath happened to the great damage of your petitioner in this, to wit:

(*a.*) That in and by the opinion and judgment aforesaid it was held that the complaint in said cause did state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff had no cause of action.

(*b.*) Error was likewise committed by said court in its opinion and judgment aforesaid, in holding that the circuit court of the United States for the ninth circuit, district of Montana, did not commit error in permitting testimony to be given as to the existence of a discovery vein in the St. Louis Lode mining claim and
134 as to the strike and dip of the said vein, no allegation whatever with reference to such vein being made in the complaint, or being within the issues on the trial of said action.

(*c.*) The honorable, the circuit court of appeals likewise erred in holding that a vein which enters and departs through the same side line of a mining claim has or can have extralateral rights under the laws of the United States.

(*d.*) Error was likewise committed in said opinion and judgment in holding that the circuit court of the United States for the ninth circuit, district of Montana, did not err in permitting the witness John R. Parks to testify as to the use by your petitioner of the four-hundred-foot level in the Nine Hour Lode mining claim, there being no allegation in the complaint alleging any damages for the use and occupancy of the St. Louis Lode mining claim or any part or portion thereof.

(*e.*) It was likewise error in the opinion and judgment aforesaid to hold that the circuit court for the ninth circuit, district of Montana, did not err in receiving in evidence the judgment-roll in the specific-performance case shown in the record herein, and it erred in holding that the said judgment-roll was relevant and competent testimony.

(*f.*) It was likewise manifest error for this honorable court to hold in and by said opinion and judgment aforesaid that the circuit court for the ninth circuit, district of Montana, did not err in allowing testimony to be given by the plaintiff in said suit, to wit: the de-

fendant in error here, to recover for quartz rock and ore held by the said court under injunction, as shown at page 49 in the printed record accompanying this petition.

(*g*.) It was likewise error in this honorable court in and by its opinion and judgment aforesaid to hold that the above-
135 named defendant in error, The St. Louis Mining & Milling Company of Montana, was not estopped by its contract, the judgment rendered in the supreme court of the State of Montana in the specific-performance case aforesaid, and by its deed made in pursuance of said contract and judgment, from claiming any mineral whatever contained in the said thirty-foot strip or compromise ground.

(*h*.) Error was likewise committed in the opinion and judgment aforesaid in holding that the honorable, the circuit court of the ninth circuit, district of Montana, did not err in giving to the jury on the trial of said cause its instruction numbered 1, as shown in the record herein.

(*i*.) Error also happened in the opinion and judgment aforesaid in that this honorable court refused to give full faith and credit to the judgment of the supreme court of the State of Montana in the specific-performance case, the same being shown in the record herein at page 63 to page 86 thereof, in that it refused to hold that the above-named plaintiff, defendant in error here, was not estopped and enjoined in and by such judgment from claiming any mineral found in the said thirty-foot strip or compromise ground.

Your petitioner further shows that in this case the jurisdiction of the circuit court of the ninth circuit, district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; but that in and by the complaint and pleading on the part of the defendant in error, plaintiff in the court below, there were question- arising under the Constitution and laws of the United States in this, to wit: Whether the owner of a mining claim under the laws of the United States might follow a vein beyond the
136 side lines of his claim, the apex of which said vein entered and departed through the same side line of his claim; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom at an acute angle beyond a point where the whole of the apex of such vein was within the lines of his own claim; and the further question as to what faith or credit should be given to the judgment in the specific-performance case hereinbefore mentioned; that as said case was originally brought in the said circuit court of the ninth circuit, district of Montana, the jurisdiction of said court depended entirely upon the said Federal questions and not upon the diversity of citizenship of the parties.

Wherefore your petitioner prays for an order allowing it to prosecute a writ of error from the honorable the Supreme Court of the United States to this court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner

shall give and furnish upon said writ of error, and that upon the giving of such security that all further proceedings in this court be suspended and stayed until the final determination of the said writ of error by the honorable the Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray.

C. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Petitioner.

137 Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this court be stayed upon the petitioner executing a good and sufficient bond in the sum of twenty-five thousand dollars, conditioned as required by statute.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for writ of error, order allowing same, &c. Filed October 24, 1900, F D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

138 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY (LIMITED), Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Comes now the above-named plaintiff in error, by Messrs. Cullen, Day & Cullen and Charles J. Hughes, Jr., its attorneys, and assigns the following as errors upon which it will rely for the reversal of the opinion and judgment rendered by this court in this cause on the 14th day of May, A. D. 1900.

I.

The holding of this honorable court in its opinion and judgment aforesaid that the circuit court of the ninth circuit in and for the district of Montana, did not err in overruling the defendant's (the above-named plaintiff in error) objection to the introduction of any testimony on part of plaintiff (defendant in error) for the reason that the second amended supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

II.

The holding of this court that the said circuit court did not err in permitting the witness William Mayger to testify that the discovery vein of the St. Louis Lode mining claim ran more parallel

with the location of the St. Louis Lode claim than in any
139 other direction, the said testimony being irrelevant and immaterial under the issues made by the pleadings.

III.

The holding of this court that the said circuit court did not err in admitting any and all of the testimony offered and by it received in evidence with reference to the discovery vein of said St. Louis Lode mining claim, and its strike and dip, the same being irrelevant, immaterial, and not competent testimony under the pleadings.

IV.

The holding of this court that the said circuit court did not err in permitting the witness James S. Keerl to testify that the lines representing the planes drawn upon Plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis Lode mining claim, such testimony being incompetent and immaterial, it not having been shown by any competent proof which were end lines or which were side lines of said claim.

V.

The holding of this court that the said circuit court did not err in permitting the witness James S. Keerl to give the dimensions of blocks numbered eight, nine, ten, and eleven, which were situated north of the 108-foot plane, as shown upon Plaintiff's Exhibit 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary line of the thirty-foot strip intersects it, the same being incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the compromise ground, together with all the mineral therein contained, and it being alleged in the answer that the said compromise ground had been conveyed by the plaintiff to the defendant, in pursuance of a bond for a deed, describing the compromise ground by
140 metes and bounds, and conveying the same to the defendant, together with all the mineral therein contained, which said bond and deed being attached as exhibits to the answer were not denied, but specifically admitted by the replication, and therefore the plaintiff was estopped from claiming any mineral within the said compromise ground, it clearly appearing from the testimony of said witnesses that the mineral about which he was testifying was within the lines of the compromise ground.

VI.

This court erred in holding that the said circuit court did not commit error in permitting the witness John R. Parks to testify that the discovery vein of the St. Louis lode ran generally parallel to the side lines of the said claim, there being no issue made by the pleadings relative to the discovery vein of the said claim, or as to its strike or dip.

VII.

This court erred in holding that the said circuit court did not err in permitting the witness John R. Parks to testify to the contents of blocks eight, nine, and ten, it clearly appearing from the testimony that the said blocks were in what was designated and known as the compromise ground, and that under the allegations in the pleadings the plaintiff was estopped to claim any mineral found therein.

VIII.

This court erred in holding that the said circuit court did not err in permitting the witness John F. Parks to testify that the 400-foot level had been used by the defendant in the operation of its mine, such testimony being irrelevant and immaterial, in that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and is not an action to recover for the use of levels constructed by the defendant upon its own property.

141 IX.

This court erred in holding that the said circuit court did not err in permitting the witness Walter Proctor Jenney to testify that the discovery vein of the St. Louis Lode claim was connected with a vein called the discovery vein and in permitting the said witness to describe the said vein, such testimony being immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis Lode claim and no issue in the pleadings with reference thereto.

X.

This court erred in holding that the said circuit court did not err in admitting in evidence in rebuttal the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff, and the defendant in error herein was defendant, the same not being in rebuttal of anything proved or offered to be proved on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed attached as exhibits to defendant's answer herein.

XI.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"The parties to this action having by agreement settled the boundary line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the

defendant, you are instructed that you cannot find a verdict
142 for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground with the easterly boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines, and the northerly projected end line, as claimed in the complaint."

XII.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have lines drawn down parallel to the end lines of its St. Louis claim."

XIII.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction:

143 "If you believe from the testimony in this case that the defendant, though it mined the ores *in* which the plaintiff has designated as blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

XIV.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed

to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

144 XV.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

XVI.

This court erred in holding that the said circuit court did not err in giving the following instruction to the jury:

"Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 502 and the 108."

XVII.

145 This court erred in holding that the said circuit court did not err in giving the following instruction to the jury:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

Wherefore the said, The Montana Mining Company, Limited, plaintiff in error, prays that the judgment of said circuit court of appeals of the ninth judicial circuit be reversed and that the said circuit court of appeals be directed to enter an order requiring the circuit court of the ninth circuit within and for the district of Montana to set aside the verdict rendered herein, and also dismissing the said action.

C. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Plaintiff in Error.

Endorsed: Assignment of errors. Filed October 24, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

146 Know all men by these presents, that we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto The St. Louis Mining and Milling Company of Montana in the full and just sum of twenty-five thousand dollars, to be paid to the said The St. Louis Mining & Milling Company of Montana, its certain attorney executors, administrators or assigns; to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of October, in the year of our Lord one thousand nine hundred.

Whereas, lately at a term of the circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The Montana Mining Company, Limited, plaintiff in error, and The St. Louis Mining & Milling Company of Montana, defendant in error, a judgment was rendered against the said The Montana Mining Company, Limited, affirming a judgment for the sum of $23,209, rendered against it on the 16th day of Aug., 1899, in the U. S. circuit court, dist. of Montana, and in favor of the above-named The St. Louis M. & M. Co. of Montana, and the said The Montana Mining Company, Limited, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said The St. Louis Mining & Milling Company of Montana citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of December next:

147 Now, the condition of the above obligation is such, that if the said The Montana Mining Company, Limited, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MONTANA MINING CO., L'D, [SEAL.]
By ALEX. BURRELL, *Attorney-in-fact.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By its attorney-in-fact,
JOHN H. ROBERTSON. [SEAL.]

Acknowledged before me the day and year first above written, by Alex. Burrell.

[SEAL.] J. S. MANLEY,
U. S. Commissioner, Northern District of California.

(Cancelled internal-revenue stamps.)

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved. Wm. B. Gilbert, circuit judge. Filed Oct'r 24, 1900, F. D. Monckton, clerk.

148 United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF Montana.
} No. 567.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and forty-seven (147) pages, numbered from one (1) to one hundred and forty-seven (147), inclusive, to be a true copy of the record, and of the assignment of errors, and all proceedings in the above-entitled case, as the same appear of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 15th day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled 11, 15, 1900. F. D. M., cl'k. }

149 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable, the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The Montana Mining Company, Limited, plaintiff in error *vs.* The St. Louis Mining and Milling Company of Montana defendant in error, a manifest error hath happened, to the great damage of the said The Montana Mining Company, Limited, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 20th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand, nine hundred.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. B. GILBERT,
Circuit Judge.

150 [Endorsed:] Docketed. No. 567. United States circuit court of appeals for the ninth circuit. Montana Mining Co. (L'd), plaintiff in error, vs. St. Louis Mining and Milling Co. of Montana, defendant in error. Original writ of error. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within writ of error is hereby admitted & receipt of copy acknowledged this 29th day of October, A. D. 1900. Dated at Helena, Mont., on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Mont., Def't in Error

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, in a certain schedule to this writ annexed we certify under the seal of our said circuit court of appeals the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

151 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 20th day of December, 1900, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Montana Mining Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, U. S. circuit judge & judge of the United States circuit court of appeals for the ninth circuit, this 24th day of October, A. D. 1900.

WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Docketed. No. 567. U. S. circuit court of appeals for the ninth circuit. The Montana Mining Co., Limited, pl'ff in error, *vs.* The St. Louis Mining and Milling Co. of Montana. Original citation. Filed November 2nd, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within citation is hereby admitted and receipt of copy acknowledged this 29th day of October, A. D. 1900.

Dated at Helena, Montana, on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Montana, Def't in Error.

Endorsed on cover: File No. 18,001. U. S. C. C. of appeals, 9th circuit. Term No. 213. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining and Milling Company of Montana. Filed December 18, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 214.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

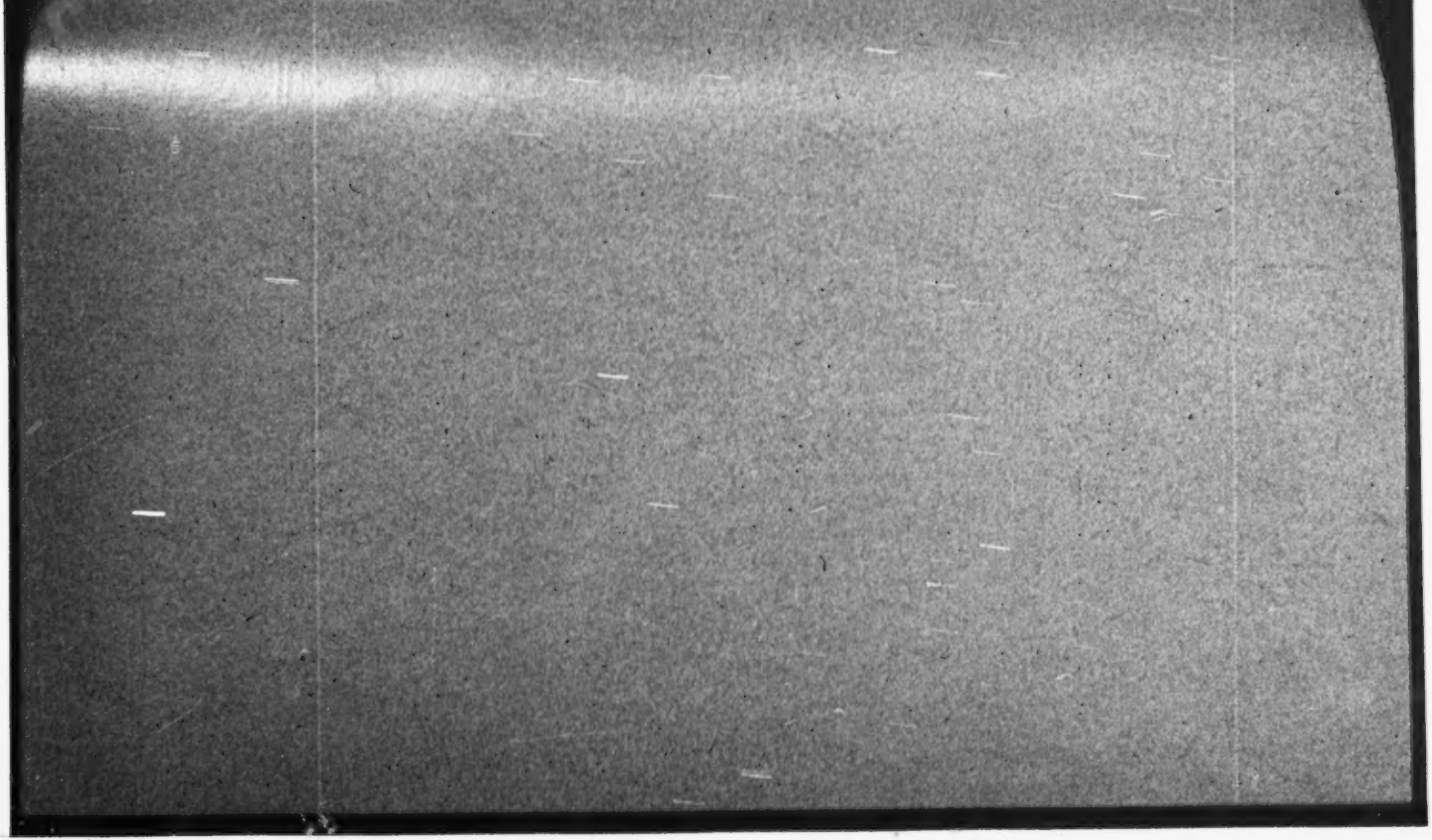
vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 18, 1900.

(18,002)



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1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered, that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for a second amended and supplemental complaint, by leave of the court first had and obtained, complains of the defendant herein, and for cause of action alleges:

2 I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said

fractional portion of said St. Louis Lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side
line of the surface of the said St. Louis Quartz Lode mining
3 claim, which is situated in Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches, marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east,
4 north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529.7 feet distant, intersects said township line, a granite stone 18 by 16 by 7 inches, marked "54 A, 54 M. C.," 1,069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21.5 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1,500 feet in length

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13 And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2, and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended and supplemental complaint contained.

III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may
14 hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the district court of the first judicial district of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant

north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz
7 Lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 106 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred
8 thousand dollars; on account thereof this plaintiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of The St. Louis Mining and Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of
9 said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof: and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County,
State of Montana.

(Endorsed:) No. 291. (Title of court and cause.) Second amended and supplemental complaint. Filed and entered June 26, 1899. Geo. W. Sproule, clerk.

10 The summons in this cause as heretofore issued being in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Howkins, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of Helena, county of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

11 You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of Mon-

tana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode mining claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plain-
12 tiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana — Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States court.

Helena, Sept. 21, 1893.

WM. F. FURAY,
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

(Endorsed:) No. 291. (Title of court and cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, clerk.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William
17 Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situate in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode claim and the Nine Hour Lode claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said
18 course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.
CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.
CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

19 TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 p. m.
O. B. TOTTEN.

EXHIBIT "B."

Deed to St. Louis Mining & Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke
20 and State of Montana, its duly authorized agent and attorney-in-fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises, situate, lying

and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46
21 degrees 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever.

In witness whereof, the said William Mayger, as attorney-in-fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney-in-fact.

22 STATE OF MONTANA, }
County of Lewis & Clarke, } ss:

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney-in-fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney-

in-fact, who duly acknowledged to me that, as such agent and attorney-in-fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

(Endorsed:) No. 291. (Title of court and cause.) Answer to supplemental complaint. Filed and entered June 30, 1899. Geo. W. Sproule, clerk.

23 And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer
24 stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode mining claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode mining claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes or ledges, which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover

only such quartz rock or ore and the value thereof, and the damages for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode mining claim, exclusive of the said thirty-foot strip or compromise ground.

Admits that said Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the court and the deed mentioned in said defendant's answer executed in pursuance thereof.

25 And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this honorable court that the said thirty-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in district court of the first judicial district of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action

26 was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim, the boundaries of which claims had been and were at the time of the execution of

the said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed which the court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

27 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) No. 291. (Title of court and cause.) Replication. Filed and entered July 14, 1899. Geo. W. W. Sproule, clerk.

28 And thereafter, to wit, on the twelfth day of August, 1899, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*

(Endorsed:) No. 291. (Title of court and cause.) Verdict. Filed and entered August 12, 1899. Geo. W. Sproule, clerk.

29 And thereafter, to wit, on the sixteenth day of August, 1899, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Judgment.

Be it remembered, that on this seventh day of August, A. D. 1899, the above-entitled cause coming on for hearing, and the same having been duly submitted to a jury of twelve lawful men, duly impaneled and sworn to try the issue herein, the following verdict was duly returned into court, to wit:

30 "In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury, in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*"

It is therefore considered, ordered and adjudged that the said plaintiff have and recover of the said defendant the said sum of twenty-three thousand two hundred and nine dollars ($23,209.00), together with its costs in this behalf expended, taxed at the sum of ninety-five and sixty-five one-hundredths dollars, and that it have execution therefor.

Dated August 16, 1899.

Entered August 16, 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

Attest: A true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

31 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, *vs.* MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Clerk's Certificate to Judgment-roll.

I, George W. Sproule, clerk of the circuit court of the United States, for the ninth judicial circuit, district of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this sixteenth day of August, 1899.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

(Endorsed:) No. 291. (Title of court and cause.) Judgment-roll. Filed Aug. 16, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 28th day of August, A. D. 1899, a bill of exceptions was duly allowed, signed and filed, which is as follows, to wit:

32 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, *vs.* MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered that this cause came on for trial before a jury on the 8th day of August, 1899, that being one of the days of court of the April term, 1899, of the said circuit court. The jury was duly impaneled and sworn to try the case and thereupon the following proceedings were had.

WILLIAM MAYGER, was called as a witness for plaintiff, and having been duly sworn, testified substantially as follows: I am the superintendent and general manager of the plaintiff company, the St. Louis Mining and Milling Company, have filled that position since 1887. I am acquainted with the discovery vein of the St. Louis claim; that is not the vein which is in controversy here; the discovery vein is the one upon which the location was made.

The witness then referred to the map which was afterward
33 introduced in evidence and marked "Plaintiff's Exhibit No. 1;" continuing, the witness testified as follows: The discovery vein of the St. Louis claim runs nearly parallel with the

side lines of the claim, and runs very nearly at right angles to the end lines of the claim, which are marked on the map 3 and 4, and 1 and 6; the discovery vein dips toward the east, the Nine Hour mining claim; that vein was followed out toward the south to between fifty and seventy-five feet from the south end line, and north of the discovery shaft the vein runs also nearly parallel with the side lines in a northerly direction 300 or 400 feet. I know the end lines as located and patented; on the map, the north end line is the one marked corner No. 1, and corner No. 6; and the south end line is marked corner No. 3 and corner No. 4. I have pointed out to Mr. Keerl the discovery vein of the St. Louis claim.

I have read the answer in this case and the copy of deed annexed thereto. I executed that deed in behalf of the plaintiff company.

The witness was then asked the following question:

Q. Under — circumstances was that deed executed?

To which counsel for defendant objected and stated to the court: "If that is evidence anywhere it is evidence in rebuttal and not on the direct case."

The court sustained the objection, and in so ruling said, "I will sustain the objection at this time."

Thereupon plaintiff called JAMES S. KEERL as a witness, who, having been duly sworn, testified substantially as follows: I am a civil engineer and have been for about twenty-three years;
34 I am familiar with underground surveying. I have surveyed the premises known as the St. Louis claim, and the premises adjoining that claim on the east, and known as the Nine Hour claim; that survey covered the surface as well as the underground workings; I have made a map of that survey and produce it.

Referring to the map, the witness pointed out corners 1, 2, 3, 4, 5, and 6 as shown thereon.

Continuing the witness said: I got these numbers from the patent, and they correspond with the numbers on the patent.

The witness then pointed out the different corners, open cuts, tunnels, and other workings on the mines referred to as indicated on the map, and added that the shaded portions represent shafts that are sunk on the wall; weak shadings indicate stopes; full black lines show workings underground; light black lines indicate open cuts.

The witness testified that the map was a correct representation of the country which it purported to represent and was drawn to a scale of ten feet to the inch. The map was then introduced in evidence and marked "Plaintiff's Exhibit No. 1." (Here insert map.)*

Continuing, the witness testified substantially as follows: I am

*Under rule 34, map in custody of United States marshal. See, also, stipulation, page 93 of this record.

familiar with the vein in controversy in this case. The line marked on the map "Projected line parallel to end line, 520-ft. plane," is a line drawn 520 feet from corner No. 1 and parallel to the end line of the St. Louis claim.

35 The line marked "Projected line parallel to end line, 108-ft. plane," is drawn parallel to the end lines of the St. Louis claim, 108 feet south of the point at which the west side line of the compromise ground intersects the east side line of the St. Louis claim.

The line marked on the map "Projected line parallel to end line, 133-ft. plane," is drawn parallel to the end lines of the St. Louis claim, and is twenty-five feet south of the 108-foot plane.

The line marked "West side line of thirty-foot strip" was determined by surveying a line thirty feet in width parallel with the line marked 2 and 3.

It was admitted by counsel that that portion of the map included between the last-mentioned line and the line marked on the map by the numbers 2 and 3, and the two lines crossing said lines, correctly represent what is known as the thirty-foot strip or compromise ground, and form the premises described in a deed, a copy of which is annexed to the answer herein.

Proceeding, the witness testified as follows: I made an examination on the underground workings on the vein known as the Drum Lummon vein, and which is indicated on the map as commencing at the words "raise 1885," and south of the 520-foot plane, and continues in a general southerly direction along the easterly line of the St. Louis claim as shown on the map, and I have made measurements of the underground workings north of the plane known as the 108-foot plane, and designated on the plat and up to a point where the 520-foot plane intersects the east side line of the

36 St. Louis claim. I have made different calculations of the amount of ore taken out east of the line known as the west side line of the thirty-foot strip, and between the plane known as the 108-foot plane and a plane parallel thereto, intersecting the point at which the easterly boundary of the St. Louis claim intersects the westerly boundary line of the thirty-foot strip.

Thereupon, the plaintiff offered in evidence the judgment-roll being "Plaintiff's Exhibit No. 2," hereinafter fully set forth, together with a stipulation hereinafter set forth, both of which papers are hereby referred to but are omitted at this point for the purpose of reducing the record as far as possible, to which evidence the defendant objected, upon the ground that it was not the proper time for the introduction of the same; which objection was by the court sustained. To which ruling of the court plaintiff then and there duly excepted.

The witness then continued his testimony as follows: In making my calculations of the ore taken out of the Drum Lummon vein to the east of the line marked "West side line of the thirty-foot strip," and between the plane marked "108-ft. plane" and a plane parallel

thereto, and intersecting the east side line of the St. Louis claim at a point where the west side line of the thirty-foot strip intersects said line, I have given the different excavations by block numbers.

The witness then testified that the amount of ore taken from the points above described amounted in all to 376.2 cubic feet and to 4,889.9 tons of ore, and then described certain tunnels which
37 were run by the defendant company on the Drum Lummon vein between the planes known as the 520-foot plane and the 108-foot plane. The witness was then asked this question:

Q. I will ask you now, Mr. Keerl, if you made any measurements of the ore extracted from this vein between the 108-foot plane and the 133-foot plane, and east of the west line of the thirty-foot strip.

To which testimony defendant objected in these words: Defendant objects to that, your honor; as we understood you yesterday to say that in the Doe and Waterloo case in the circuit court of appeals, in an opinion written by yourself, in order to give extralateral rights there must be the whole of the apex in there; in other words, they could not split the apex. If that is to be the ruling there is no necessity of going south of this. Defendant objects as being wholly immaterial under the pleadings. No right is claimed by virtue of that second projected parallel end line in the complaint—the line at the 108-foot plane; that is, as far as any right is claimed, and the ore extracted is between the two planes.

Which objection was sustained by the court. To which ruling of the court plaintiff then and there duly excepted,

Plaintiff then offered to prove that between the plane known as the 108-foot plane and the plane known as the 133-foot plane, as marked on the map, and easterly of what is known as the westerly side line of the thirty-foot strip, and from the Drum Lummon lode, which has a part of its apex within the St. Louis ground proper, exclusive of the thirty-foot strip, and between the planes aforesaid, the defendant has, on the dip of said vein, extracted ore from
38 said vein to the amount of one hundred and fifty thousand dollars. To which evidence the defendant objected, on the ground that the same is immaterial and irrelevant in this, that the point of extraction is beyond the line shown by the pleadings in this case to have been agreed upon as the boundary line between the two claims, and beyond the point where the plaintiff alleges that it has the entire apex of the vein; which objection was by the court sustained. To which ruling plaintiff then and there duly excepted.

Continuing, the witness testified that the above measurements given in his testimony were taken by himself and John R. Parks, and that a small portion of the ore between the planes and from the vein aforesaid and west of the west line of the thirty-foot strip, a small portion of the ore taken by the defendant company amounted to 28.8 cubic feet or 2.2 tons,

Thereupon the plaintiff called JOHN R. PARKS, who, being duly sworn, testified substantially as follows:

That he is a consulting mining engineer, and has been in that business since 1880; that he had been consulting engineer with the St. Louis Mining and Milling Company for the last nine years; that he was also an assayer; that he had examined the underground and surface workings involved in this suit; that he was familiar with the discovery point of the St. Louis claim; that it is connected with the discovery vein, and that the discovery vein runs in a general direction parallel to the side lines of the St. Louis claim; that the said vein has been developed to within seventy feet from
39 the south end line of the claim, and that, in his opinion, it crosses the said south end line; that the vien runs, in his opinion, north and passes out of the north end line of the St. Louis claim, and that the said vein dips to the east; that there is another vein, a portion of which has its apex within the St. Louis claim, and that said vein is known as the Drum Lummon. The witness testified that he was familiar with the plane testified to and shown on the map as the 520 plane, and that at that point the hanging wall and the foot wall of the Drum Lummon vein were within the surface boundaries of the St. Louis claim, and thence continued southerly within the St. Louis claim, both hanging and foot wall, and that its dip was to the east; that the said vein had its entire apex within the surface boundaries of the St. Louis claim proper from the point mentioned down to the point known as the point where the 108-foot plane intersects the west side line of the compromise ground or thirty-foot strip, which point is 108 feet south of the intersection of the west line of the compromise ground with the east line of the St. Louis claim; that at said point the hanging wall of the vein passed out of the St. Louis claim proper and into the said compromise ground or thirty-foot strip; that the foot wall continued beyond that point within the St. Louis claim proper and west of the thirty-foot strip for some distance beyond the plane known as the 133-foot plane; that the said wall had been traced wholly within the St. Louis ground property and west of the thirty-foot strip to a
40 point 301 feet south of the point of intersection of the east side line of the St. Louis claim with the west side line of the thirty-foot strip.

Continuing, the witness testified that he had been in the underground workings between the 108-foot plane and the plane known as the 520-foot plane and had ascertained the amount of ore taken out by the defendant company from the Drum Lummon vein between the planes aforesaid and underneath the surface of the Nine Hour claim, including the thirty-foot strip or compromise ground, and that these measurements were made in July, 1899; that he assisted Mr. Keerl in making the measurements to which he had already testified; that he was unable to get at the ore taken out by the defendant, so was obliged to take his samples of each block from ore remaining in each block, and that he took the samples as near as possible to each of the places from which the ore was so taken out; that the amount so taken out was as above stated by the wit-

ness Keerl; that he had carefully assayed these samples for the purpose of ascertaining the value of the ore taken out per ton, and that the value of the ore so taken out from the block described was thirty thousand nine hundred and ninety-eight dollars ($30,998.00).

Proceeding, the witness testified that he had measured the ore taken from the Drum Lummon vein by the defendant, east of the east side line of the St. Louis claim proper and between the plane known as the 108-foot plane and the 133-foot plane, a portion of said ore being a part of the said vein lying east of the compromise ground, and the rest being part of the vein within that
41 ground; that there were four blocks of such ore taken out by defendant east of the compromise ground, which he had numbered blocks 3, 4, 5, 6 and 7.

The witness was then asked the following question:

Q. Tell us about block 3—how many cubic feet in that?

To which question the defendant objected, on the ground that the same is immaterial and irrelevant, for the reason that, according to the pleadings of plaintiff in this action, they are beyond the agreed boundary lines between the claims. This is the same objection which was made to similar testimony on the part of Mr. Keerl; which objection was by the court sustained. To which ruling of the court the plaintiff then and there duly excepted. The witness further testified that all of the measurement samples so taken by him were taken in the presence of employés of the defendant by it designated to accompany him at that time.

The plaintiff then called WALTER PROCTOR JENNEY as a witness, who, being duly sworn, testified substantially as follows:

I am a mining engineer and consulting geologist, and have been for thirty years, and during that time have frequently examined and reported upon mines of all kinds. I have examined the St. Louis and the Drum Lummon veins, the property in controversy, for twenty days in the field; I have examined the openings on the St. Louis claim, and those upon the Nine Hour. I have examined the discovery of the St. Louis claim; it is connected with a
42 vein—the vein named the Discovery vein. It is developed by a tunnel to a point about ninety-five feet, as shown on the map, from the south end line of the claim. The tunnel is in ore all the way; the vein is a strong vein; the dip is nearly vertical; going north the vein is strong. I examined the vein for the purpose of determining if it passed through the north end line or not; I am of the opinion that it does.

I have carefully examined the Drum Lummon vein; I find it in part in the St. Louis claim; the entire apex of the vein on its course, hanging wall and foot wall, is entirely within the St. Louis surface ground between the planes mentioned in the complaint as the 520-foot plane and the 108-foot plane; the hanging wall passes out at the point where the 108-foot plane intersects the east side line of the St. Louis claim as now possessed—that is the west side line of the thirty-foot strip; the foot wall passes through the 108-foot plane,

going southerly; it is not determined accurately where the foot wall passes out of the St. Louis ground, but it is still within the St. Louis ground west of the west side line of the compromise ground at a point south of the 133-foot plane.

The defendant then moved to have the testimony with reference to the foot wall stricken out, on the ground that it is immaterial and irrelevant and is contradictory to the pleadings which allege that the foot wall passes out at the 133-foot plane; which motion was sustained. To which ruling of the court the plaintiff then and there duly *executed.*

43 The witness then testified that the Drum Lummon vein passed beyond the 108-foot plane northerly within the St. Louis claim and passed out of the north end line of that claim.

The defendant thereupon moved to strike this testimony out; which motion was granted by the court. To which ruling plaintiff then and there duly excepted.

The witness Jenney further testified that the dip of the Drum Lummon vein is in an easterly direction.

MILLIAM MAYGER, being recalled, testified substantially as follows: That the ore bodies testified to as blocks 8, 9 and 10 by the witnesses Keerl and Parks were taken out by the defendant and within the times mentioned in the second amended and supplemental complaint herein; that portion of this ore was removed by defendant and placed in a level in the Nine Hour ground driven by defendant and dropped into the lower workings of the defendant company.

Whereupon the plaintiff rested.

Defendants called and had sworn DAVID HERRON, a witness of lawful age, who testified as follows:

I reside at Marysville. I am surveyor for The Montana Mining Company, Limited, the defendant. I am familiar with the works of the Montana Mining Company in and about the points where the one hundred and eight foot line crosses the compromise ground, and I am familiar with those portions of the ground testified to by the witness Keerl and the witness Parks as blocks 8, 9, 10 and 11. I have made a survey of the ground and a map of it.

44 Whereupon the witness produced map marked "Defendant's Exhibit No. 3," which said map was offered and received in evidence, and is as follows, to wit (here insert map):*

The portions colored blue in the longitudinal section are the stopes of the defendant, and those colored red are the stopes of the plaintiff. The line A B is the projected end line drawn parallel to the end lines of the St. Louis claim. The line C D is the projection of the west boundary line of the thirty-foot strip. The portion of the map left not colored is the ground not stoped.

* Under rule 34, map in custody of United States marshal. See, also, stipulation page 93 of this record.

Defendant likewise called and had sworn one C. W. GOODALE, a witness of lawful age, who testified as follows:

I am by profession a mining engineer. I am at present superintendent of the smelter of the Boston & Montana Company at Great Falls. I am familiar with the ground here in controversy. I first visited the Nine Hour workings in April and May, 1893. I first saw the Montana Company's apex shaft in June, 1893. At that time it was about thirty or thirty-five feet deep. At the time I first saw it no connection had been made with the plaintiff's twenty-foot level, but when I saw the ground again about the twenty-first of September the level had been driven into the shaft and a brattice or bulkhead had been put in on the westerly line of the compromise ground. I have gone down the apex shaft to the lower workings upon the compromise strip and upon the Nine Hour at different times. I was in the one hundred and ninety foot level in
45 April or May, 1893. On my return from the East, about the twentieth of September, the drift in this level had been extended about thirty-five or forty feet north from where it was when I first saw it. It was the ordinary size of a mining drift—about seven feet high and four and a half or five feet wide. I examined the material which came out of that drift. It was a very low-grade quartz or vein matter, carrying no copper stain. There was no stoping done in the level, but a little overcutting was done and timber put in to prevent it from caving. I was in this level a few days since. There was quartz in the back of the drift, a very low-grade looking material. There would be no difficulty in getting a sample from it of the material in the drift, and the material that could be obtained would be a fair average sample of what came out of the drift. The pay chutes in the Drum Lummon trend in a southerly direction. A sample taken from a point in the winze one hundred feet above the one hundred and ninety foot level would not fairly represent the material taken out in running the level it would be in much higher-grade ore. At the point where Prof. Parks says he took the sample, the ore is of high grade, while in the one hundred and ninety foot level it was poor.

Cross-examination:

I made the affidavit which you now show me sworn to on September 23, 1893. I made this statement: "I have made a careful examination of the stoping done by the said Montana Company, Limited, and its predecessor in interest in the Nine Hour ground, and while there is no direct connection between the said stoping and
46 the said shaft, called the Montana Company's apex shaft, I am quite satisfied that no ore has been stoped from any ground lying to the north of the line drawn through a point where the strike of said lode probably crosses said compromise line, parallel with the south end line of plaintiff's said St. Louis Lode mining claim." The point at which I testified according to this affidavit that no work was done would be north of where the line goes out now. The point where I thought the vein passed out at that time was twenty feet, more or less, from the Montana Company's apex shaft and to

the north of the one hundred and eight foot line as now drawn down.

Redirect examination:

I last examined block 9 on the seventh of August, this week. I climbed up from the eighty-five-foot level and above the forty-six. I climbed up on the brattice and caved ground and identified the top of this brattice which has been described. I climbed up to the surface, and it is my opinion that the block called block No. 9 has not been removed; that it is still there. There is certainly a triangular piece of ground or cone there. I climbed up to the surface and identified the brattice described, and from what I have seen on the north side of the Montana Company's apex shaft I do not believe that material was used. I think the pillar of ground above the twenty-foot level of the St. Louis Company and between the red stope shown on the Montana Company's map on the apex shaft and extending to the face has not been removed.

47 Defendant also called and had sworn ALEXANDER BURRELL, a witness of lawful age, who testified as follows:

I am a miner. I have been engaged in that business for about twenty-five years. I have been connected with the Drum Lummon since 1888. I was mine superintendent up to April, 1897, since which time I have been manager. We commenced sinking the Montana Company's apex shaft on the first day of June, 1893, and sunk it down to a depth of about thirty-five feet, when we were obliged to stop from the fact that the St. Louis Company's eighteen-foot drift was approaching so near that the shots made it not safe to work in the shaft. On the twenty-fifth of June they broke through into our apex shaft. We then stopped them from coming in, and after they had knocked a hole through we put in a brattice within about a foot of the line. We left about a foot to be sure. We also put in two short stulls. That is all the stoping we did there, and we left the material in the bottom of the shaft and on the floor of the drift. At that time no stoping of the ground had been done by the Montana Company, or by anybody, north of the apex shaft along the line of the compromise ground. I have had continuous control of the operations of the property since and no ore has been removed by anybody over whom I had control north of the apex shaft and within the ground which plaintiff calls its block No. 9. The ground has caved in and dropped into the stope, part on one side of the line and part on the other. I think the greater part is on plaintiff's forty-six-foot level. No ore has been taken by
48 either of the companies with which I have been connected out of what plaintiff claims as block No. 9. In block No. 8 we commenced work immediately after the decision of the Supreme Court of the United States granting us the title to that strip of ground with all the mineral therein contained, which was about a year ago—probably in October or November last. I do not know whether we worked any ore from blocks No. 8 and 11 prior to the service of the injunction. That would have to be determined by

the amount left in the upraise that is not taken out, but I have estimated that possibly we milled forty or fifty tons of that ore before the order reached us. The ore that was in the chute we were allowed to remove and bring to the surface, and I have rendered a statement of that ore to this court. There was about sixty tons of it. The balance of the ore that came out of blocks 8 and 11 is in the upraise above the one hundred and ninety foot level. It is in the St. Louis winze sunk from their forty-six-foot shaft to the eighty-five-foot, as continued down by us. The ore is in that winze lying along the bottom of the drift or raise—it is about half full.

Block No. 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six-foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level as driven in what is called block 10 was of a regular size—
49 six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had no mineral value, and was not worked in the mill. It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south. Starting at the top and going at right angles to the dip the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level, by any means. You might as well go across the range and get a piece of ore as to go there, because of the character of the ground. The trend of the ore body is to the south and the stopes on the one hundred and ninety foot level as you go northerly leave the pay ore. There is no pay ore over the back of the level at the edge of the stope. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken from the drift, because the top is nearer the bottom of the southern trend than the bottom of the drift, corresponding to its height. There has never been any stoping done in that part of the one hundred and ninety foot level known as block 10. The custom is to take out samples every morning from all places where they are working in the mine, tie them up and mark them and send them to the assay office to know whether ore or waste; there was no exception in this case.

Cross-examination:

50 Only part of the material of block 8 remained in the winze; some of it was passed through the winze; some we carried away and milled.

The material that came out of block 10 was deposited probably one hundred and eighty or two hundred feet south of the point in the level where it came out. That part of the mine has caved and

it probably went down in the waste cave or old original stope. We carried the ore from block No. 10 to the south of the Nine Hour shaft; it is caved down into the works of the Nine Hour. The same disposition was made of the material that came out of block 11 as that which came out of block 8; it was carried into the works of the Nine Hour lode. I know where the two-hundred-foot raise is. We did not stope to the north at that point.

Defendant also called and had sworn JOHN HERRON, a witness of lawful age, who testified substantially as follows:

I am a civil engineer by occupation. I have followed that business for about twenty years. I was for five and a half years at Marysville in the employ of the Montana Mining Company. While there I became acquainted with the mining claims in controversy. I know the Montana Company's apex shaft, plaintiff's twenty-foot level, and I know that the apex of the Drum Lummon lode is at that point. There has been no work done by the Montana Company above the twenty-foot level north of its apex shaft, unless it
51 was a little timbering. There was no stoping done there and no ore taken out there. I am acquainted with the one hundred and ninety foot level in defendant's ground. While the level was being run northerly from the one hundred and eight foot line I was in it nearly every day. The material which came out was waste, and was carried south into the level and dumped in the bottom of the drift. None of it was worked.

On cross-examination the witness testified that some of the material taken out in block 8 was milled.

Defendant also called and had sworn one WILLIAM M. PHILLPOTTS, a witness of lawful age, who testified substantially as follows, to wit:

I am a mining engineer. I have been with the defendant company for the last five years. I am acquainted with the one hundred and ninety foot level. It is about thirty-five feet long; about twenty-seven or twenty-eight feet of it at the north end is open. The southerly ten or twelve feet of it is filled up. I gained access to it from plaintiff's eighty-five-foot level. I went down the raise from that level into the one hundred and ninety foot level. There is quartz and vein matter in the back of the level. I took a sample of it, or rather I took six samples. I took the first one twenty-three feet south of the north face. The second one is a sample of the pile of ore that lies in the drift; the third one is a sample taken sixteen feet south of the north face; the fourth one about twelve feet south of the north face, and the fifth one is six feet south of the north face, and the last one is a sample of the face.

52 (Here the witness produced the samples for exhibit to the jury.)

I am an assayer and I assayed these samples. No. 1 assayed .12 oz. in gold and 1.6 oz. in silver—value in gold, $2.48; silver, $.96; total, $3.44. No. 2 contained .11 oz. in gold and 1.9 oz. in silver; total value, $3.41. No. 3 contained .12 oz. in gold, 1.5 oz. in silver;

total, $3.38. No. 4, trace of gold and .7 oz. silver; total value, $.42. No. 5, a trace of gold and 1.5 silver; total value, $.30. No. 6, .02— gold and .8 oz. silver; total value, $.89.

I heard the testimony of Mr. Parks and heard him describe the point from which he took the sample that he assayed as a sample of the contents of this block No. 10. It would not represent the value of that block at all, as it is not taken anywhere near that point.

Upon cross-examination the witness testified that when he took the samples referred to by him, no one was present except the agents of defendants; and no notice was given to plaintiff when he intended to take these samples. Thereupon defendant rested.

Rebuttal:

The plaintiff thereupon offered in rebuttal the complaint and exhibit attached thereto, the answer the findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant, which papers have been offered in evidence heretofore in this case and marked "Plaintiff's Exhibit No. 2," are as follows, to wit:

53 PLAINTIFF'S EXHIBIT No. 2.

(Title of Court, Title of Cause.)

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges:

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana, by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, The St. Louis Mining & Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral-land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of
54 the Nine Hour Lode mining claim, situate, lying and being in Ottawa (unorganized) mining district, in the county of

Lewis & Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,884.5 feet, together with all the mineral therein contained; that thereafter, in causing to be surveyed for a patent his St. Louis Lode mining claim, the above-named defendant, Charles Mayger, had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part
55 of the Nine Hour Lode mining claim, so the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession and entitled to the possession thereof. And thereupon said defendant, Charles Mayger, having wrongfully made application in the United States land office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis mining claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke, to determine the right to the possession of said premises. In the said action so commenced as aforesaid the said William Robinson and James Huggins were plaintiffs and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject-matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the
56 compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so

that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A," and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said district court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed; that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis mining claim, and thereafter an United States patent was duly issued to him for said St. Louis Lode mining claim as surveyed, and included therein that portion of the Nine Hour Lode mining claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1889. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors
57 in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode mining claim.

IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D. 1893, demanded of and from the said defendants that they make, execute, and deliver a good and sufficient deed to it of and for the premises above mentioned and described, in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by said plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the

request of the plaintiff that he make and execute to it a deed
58 for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893, for an alleged consideration of one thousand dollars, he made, executed and delivered —of and for said premises to the said defendant, the St. Louis Mining & Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed the said defendant, The St. Louis Mining & Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling, and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining & Milling Company of Montana has instituted a number of suits in the circuit court of the United States within and for the district of Montana, in which it claims that it is the owner of the remises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order
59 to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining & Milling Company of Montana, it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5, 1894, before W. E. Cullen, Jr., notary public, Lewis & Clarke county, Montana.

EXHIBIT "A."

Mayger to *Robinson et al.* } Deed.

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars,
60 for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis and Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to such application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling,
or their heirs or assigns, to make, execute and deliver to
61 the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Load claim and the Nine Hour Lode claim, and particularly described as follows, to wit: Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Load claim, between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary, between corners 1 and 2, 60.6 feet to corner No. 2 of the

St. Louis lode, 40.031 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the boundary of St. Louis lode, between corners 3 and 4. 30 feet to a point; thence north 50 degrees 28 minutes east along the line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral contained therein; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement pro-
62 vided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8, 1884, at 3 a. m.

(Title of Court, Title of Cause.)

Answer.

And now come the defendants herein and for answer to the complaint of plaintiffs:

I.

Admit that the said William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy were at the date mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then
63 or at any other time, or that the same was or is a part of the Nine Hour Lode claim, and aver that the same was and is a part of the St. Louis Lode mining claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode mining claim, as hereinafter set forth.

Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis mining claim over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis mining claim as originally located included and embraced the said *locus in quo* and every part thereof at and prior to the location of said Nine Hour Lode claim, and that the said Charles Mayger and his successors in

interest hath ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States land office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis mining claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into,
but deny that it was for the purpose of settling or agreeing
64 upon the boundary line between the said Nine Hour Lode mining claim and said St. Louis Lode mining claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode claim owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins and Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of said bond, in that it obligates the said Charles Mayger to execute a good and sufficient deed to Robinson alone, and avers the fact to be the said original bond obligated Charles Mayger to execute a deed on demand to said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that said Charles Mayger obtained a patent for said St.
Louis Lode mining claim, but deny that it contained any por-
65 tion of said Nine Hour Lode mining claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were all aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever had been, in possession of said premises or any part thereof, except the small portion aforesaid, or that they or either of them used and enjoyed the same, or any part thereof, except the small portion aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode mining claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode mining claims, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them, at the time of the making the deed by the said defendant Mayger to
66 his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the said plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon the title of plaintiff, or that it is necessary they or either of them should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode mining claim included said premises as alleged, no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this honorable court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid.

67 That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his St. Louis mining claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto, and had and held the possession thereof.

That *that* said defendant, The St. Louis Mining & Milling Company of Montana, ascertaining and hearing that the said convey-

ances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purpose of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsection 41, and section 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this honorable court that if it shall appear the said plaintiff is not the owner of said premises by any of the conveyances mentioned in the said complaint, or the title by it so pleaded, that the same be decreed null and void, and that
68 the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified. Filed January 2, 1895.

(Title of Court, Title of Cause.)

Finding of Fact by the Court.

I.

That the plaintiff and the defendant, The St. Louis Mining & Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis & Clarke, State of Montana, and that the strip of ground called
69 the "compromise ground," which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode mining claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States land office at Helena, Montana, for a patent to the said St. Louis Lode mining claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the district court of the third judicial district of Montana, within and for the county of Lewis & Clarke; that on the seventh day of March, A. D. 1884, the said Robinson, Huggins and Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

70

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode mining claim.

VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part
71 of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim.

IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of the said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said cempromise strip to his codefendant, The St. Louis Mining & Milling Company of Montana, but at the date of said conveyance, the said defendant, The St. Louis Mining & Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in
72 controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

Conclusions of Law.

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title or interest of any kind or character in or to the said compromise ground, or

any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

(Title of Court, Title of Cause.)

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen
73 & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn appearing for the defendants. A jury having been expressly waived by the parties, the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of said defendants, and the argument of counsel, and after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged, and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, The St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee-simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said de-
74 fendant, The St. Louis Mining & Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis & Clarke and State of Montana, the same shall have the force and effect of a conveyance of the said title from said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees and 32 minutes east; said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner
75 No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of — dollars.

And that the plaintiff have execution therefor.

June 1, 1895.

HORACE R. BUCK, *Judge.*

To which the defendant objected, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant in this case, and for the further reason that the evidence was not material to any issue made by the pleadings in the case; that there being no ambiguity in either the bond or deed attached as an exhibit to defendant's answer herein, there was nothing for the court to construe.

It was stipulated by counsel for both parties that any objection to such papers based upon the ground that the same were not certified to or authenticated as required by law should be waived.

The papers were admitted in evidence, and marked "Plain-
76 tiff's Exhibit No. 2." The deed referred to in the judgment is in the same form as the copy of the deed in the answer of the defendant, which is a copy of the deed which was executed in pursuance of said judgment. Said deed is as follows:

This indenture, made and entered into this — day of ——, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining and Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America,

to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence
77 north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20 degrees, 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees, 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees, 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises,
78 with the appurtenances and privileges thereto incident unto the said party of the second part and its assigns forever.

In witness whereof, the said party of the first part, by resolution of its board of trustees, has caused its president and secretary to subscribe said presents for said corporation, and to affix hereto its corporate seal the day and year first above written.

——— ———.
——— ———.

Said papers are admitted in evidence for the court alone and to enable it to construe the deed.

The plaintiff then offered to prove that from the vein known as the Drum Lummon vein and between the plane known in this case as the 108 plane, and the plane referred to as the 133-foot plane,

which is the plane 25 feet south of the 108-foot plane and parallel thereto, and from a portion of the Drum Lummon vein between the planes mentioned which has a portion of its apex within the plane and through which space the foot wall passes entirely, we offer to prove that from that portion of the vein between the planes aforesaid the defendant company has extracted ore of the value of not less than one hundred and fifty thousand dollars.

To which offer the defendant objected—first, on the ground that the same is not rebuttal evidence; and, second, on the ground that the same is at any stage of the proceedings immaterial and irrelevant, for the reason set forth in the objection which was made when the offer was first made in the case in chief. The objection
79 was by the court sustained. To which ruling of the court the plaintiff then and there duly excepted.

Thereupon the plaintiff rested.

The foregoing is substantially all the evidence given or offered to be given in said cause.

Counsel then addressed the jury, and after being instructed by the court as appears in the instructions of record, the jury retired, and thereafter, on Saturday, the 12th day of August, 1899, returned their verdict in favor of the plaintiff, which said verdict is a part of the record in this case, and is hereby referred to and made a part hereof.

And thereafter, on the 21st day of August, 1899, the plaintiff served upon the attorney for the defendant, and filed with the clerk of the above-entitled court, this, its bill of exceptions, and prays that the same may be settled, signed, sealed, and made a part of the record in this case.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

This cause having been brought on regularly before the
80 court on this twenty-eighth day of August, 1899, one of the days of the April term of said court, at which said term said cause was tried before a jury, upon the application of the plaintiff for the settling and certifying of his proposed bill of exceptions lately filed herein and served upon the attorneys for the defendant herein within the time allowed by the rules of this court, and the parties thereto having agreed that the said proposed bill of exceptions should be settled and allowed, and the defendant not desiring to propose any amendments thereto, and the court having examined said proposed bill of exceptions, and having found the same to be correct, and that the same contains substantially all of the evidence given or offered to be given in said cause:

Now, therefore, on motion of Messrs. E. W. Toole, Arthur Brown, and Thomas C. Bach, the attorneys for the plaintiff, it is ordered that said proposed bill of exceptions heretofore filed by the said plaintiff in this cause be, and it hereby is, settled as the true bill of exceptions in this case, and that the same as so settled be now and here certified accordingly by the undersigned, the judge of this court, who presided at the trial of this cause, and that said bill of exceptions, when so certified, be filed by the clerk.

Dated the 28th day of August, 1899, one of the days of the April term, 1899, of said court.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Bill of exceptions. Filed Aug. 21, 1899. Geo. W. Sproule, clerk, and also filed Aug. 28, 1899. Geo. W. Sproule, clerk.

81 And thereafter, to wit, on the 29th day of January, 1900, the plaintiff filed its assignment of errors herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Now comes the plaintiff, St. Louis Mining and Milling Company of Montana, by Arthur Brown, E. W. Toole, and Thos. C. Bach, its attorneys, and says that the record and proceedings in the above-entitled cause show that there is manifest error in this:

I.

The court erred in refusing plaintiff's offer to prove by the witness Keerl that between the plane known as the 108-foot plane and the plane known as the 133-foot plane and easterly of what is
82 known as the westerly side line of the thirty-foot strip and from the Drum Lummon lode which has a part of apex within the St. Louis ground proper, exclusive of the thirty-foot strip, and between the planes aforesaid, the defendant had, on the dip of said vein, extracted ore from said vein to the amount of one hundred and fifty thousand dollars.

II.

The court erred in sustaining the objection of the defendant to the following question asked of the witness Parks:

"Q. Tell us about block 3. How many cubic feet in that?"

Block 3 being a block of ore removed by the defendant from the vein referred to in assignment I, between the planes therein referred to and from that portion of the dip thereof which is east of the easterly side line of the compromise strip.

III.

The court erred in granting the motion of the defendant to have the testimony of the witness Jenney, with reference to the foot wall, stricken out. Said testimony was, in substance, as follows:

"The foot wall passes through the 108-foot plane, going southerly; it is not determined accurately where the foot wall passes out of the St. Louis ground, and it is still within the St. Louis ground west of the west side line of the compromise ground at a point south of the 133-foot plane."

IV.

And the said court erred in sustaining the objection to the
83 following question put to the witness Keerl: "I will ask you now, Mr. Keerl, if you made any measurements of the ore extracted from this vein between the 108-foot plane and the 133-foot plane and east of the west line of the thirty-foot strip?"

V.

The court erred in striking out the testimony of the witness Jenney to the effect, and the substance of which was, that the Drum Lummon vein passed beyond the 108-foot plane northerly within the St. Louis claim and passed out of the north end line of that claim."

VI.

The court erred in sustaining the objection of the defendant to the plaintiff's offer to introduce in evidence in the opening of its case the judgment-roll, being "Plaintiff's Exhibit No. 2," said judgment-roll being in an action in which the plaintiff herein was the defendant and the defendant herein was plaintiff, and which said action was brought to compel the plaintiff herein to execute the deed conveying to the defendant herein the so-called thirty-foot strip or compromise ground. The findings of the court are, in substance, to the effect that the predecessors in interest of the defendant herein, on the 7th day of March, 1884, were in posssession of the so-called Nine Hour Lode claim, and that the strip of ground called the compromise ground was at that time, and thereafter continued to be, a part of the said Nine Hour Lode mining claim; that prior to that date the predecessor in interest of the plaintiff herein had
84 made application in the United States land office at Helena, Montana, for a patent to the St. Louis Lode mining claim, and had included in its application the said thirty-foot strip or compromise ground; and that thereupon the predecessors in interest of the defendant herein filed a protest and commenced an action to determine the right to the possession of said thirty-foot strip or compromise ground; that while said action was pending the predecessor in interest of the defendant herein entered into an obligation in writing to convey said premises to the predecessor in interest of the defendant herein, and that said obligation or agreement to convey said premises was made and given for the purpose of settling and determining the action aforesaid, and for the purpose

of determining and fixing the boundary line between the Nine Hour Lode claim and the St. Louis mining claim, the boundaries of which were in conflict; that the said suit was then dismissed and the adverse claim withdrawn, and that the predecessors in interest of the defendant herein at the time of the execution of the said obligation or agreement were in the actual possession of the said compromise strip, and they and their successor in interest have ever since remained in possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim; that at the date of the execution of the said obligation or agreement it was agreed between the parties thereto that the compromise ground should be a portion of the Nine Hour Lode mining claim. The judgment of the court directed the plaintiff herein to execute the deed mentioned in the complaint in this action conveying the said compromise ground or thirty-foot strip to the defendant herein, and said deed was accordingly executed.

85 Wherefore, the said St. Louis Mining and Milling Company of Montana, plaintiff in error, prays that the judgment of the circuit court of the United States for the District of Montana be reversed, and that the said circuit court be directed to enter an order setting aside the verdict and dismissing the said cause of action.

ARTHUR BROWN,
E. W. TOOLE, AND
THOS. C. BACH,
Attorneys for Plaintiff in Error.

(Endorsed:) (Title of court and cause.) Assignment of errors. Filed January 29, 1900. Geo. W. Sproule, clerk.

86 And thereafter, to wit, on the 29th day of January, 1900, the plaintiff herein filed its petition for a writ of error herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Petition for Writ of Error and Order Allowing Same.

The St. Louis Mining and Milling Company of Montana, the plaintiff in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and judgment entered on the sixteenth day of August, A. D. 1899, comes now by Messrs. E. W. Toole, Thos. C. Bach, and Arthur Brown, its attorneys, and petitions the court for an order allowing said plaintiff to prosecute a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made

and provided, and also that an order be made fixing the
87 amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

January 29th, 1900.

ARTHUR BROWN,
E. W. TOOLE, AND
THOMAS C. BACH,
Attorneys for Plaintiff.

Upon motion of Messrs. E. W. Toole, Thos. C. Bach, and Arthur Brown, attorneys for the plaintiff, and upon filing a petition for writ of error and assignment of errors—

It is ordered that writ of error be and hereby is allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at three hundred dollars.

January 29, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Petition for writ of error and order allowing same. Filed and entered Jan. 29, 1900. Geo. W. Sproule, clerk.

88 And thereafter, to wit, on the 29th day of January, 1900, plaintiff filed its bond on writ of error herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, St. Louis Mining and Milling Company of Montana, as principal, and R. C. Wallace and Henry Klein, of Helena, Lewis and Clarke county, Montana, as sureties, are held and firmly bound unto The Montana Mining Company, Limited, defendant above named, in the sum of three hundred dollars to be paid to the said Montana Mining Company, Limited, its successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of January, 1900.

89 Whereas, the above-named plaintiff, The St. Louis Mining and Milling Company of Montana, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment entered in the above-entitled cause on the sixteenth day of August, 1899, by the circuit court of the United States for the district of Montana:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis Mining and Milling Company of Montana shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ST. LOUIS M. & M. CO.,
By WM. MAYGER, *Mgr.*
R. C. WALLACE.
HENRY KLEIN.

STATE OF MONTANA, } *ss:*
County of Lewis and Clarke, }

R. C. Wallace and Henry Klein, the sureties on the foregoing bond, being duly sworn, each for himself, says that he is a resident of the county of Louis and Clarke, State of Montana, and a freeholder therein; that he is worth the sum of six hundred dollars above all his debts and liabilities, exclusive of property exempt from execution.

R. C. WALLACE.
HENRY KLEIN.

90 Subscribed and sworn to before me this 29th day of January, 1900.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for Lewis and Clarke County, Montana.

Within bond approved January 29, 1900.

HIRAM KNOWLES *Judge.*

(Endorsed:) (Title of court and cause.) Bond. Filed and entered Jan. 29, 1900. Geo. W. Sproule, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, district of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between St. Louis Mining and Milling Company of Montana, plaintiff in error, and Montana Mining Company, Limited, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears, and it being fit that the error, if any there hath been, should be duly

corrected, and full and speedy justice done to the parties afore-
91 said in this behalf, you are hereby command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco in the State of California within thirty days from the date this writ bears date, in the said United States circuit court of appeals for the ninth circuit, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States circuit court of appeals for the ninth circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the district of Montana, this 30th day of January, A. D. 1900.

[SEAL.] GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed.

HIRAM KNOWLES, *Judge.*

Service of the within writ of error and copy thereof admitted this 31st day of January, 1900, at Helena, Montana.

CULLEN, DAY & CULLEN,
Attorneys for Defendant in Error.

(Endorsed:) Filed and entered Jan. 31, 1900. Geo. W. Sproule, clerk.

92 *Return to Writ of Error.*

The answer of the judges of the circuit court of the United States for the district of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States circuit court of appeals for the ninth circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the court:

[SEAL.] GEO. W. SPROULE, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, thirty days from the date hereof, pursuant to a writ of error, wherein St. Louis

Mining and Milling Company of Montana is plaintiff in error and you, said Montana Mining Company, Limited, is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

93 Witness, the Honorable Hiram Knowles, United States district judge for the district of Montana, this 30th day of January, A. D. 1900.

HIRAM KNOWLES,
United States District Judge for the District of Montana.

Service of the above citation and copy thereof admitted this 31st day of January, 1900, at Helena, Montana.

CULLEN, DAY & CULLEN,
Attorneys for Defendant in Error.

(Endorsed:) Filed and entered Jan. 31, 1900. Geo. W. Sproule, clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Stipulation as to Maps.

It is hereby stipulated by and between the parties to the above-entitled action that the maps heretofore introduced in evidence upon the trial of the said action in the said court, and marked

94 Plaintiff's Exhibit No. 1 and No. 1*a*, and Defendant's Exhibit No. 3, may be transmitted by the clerk of the said circuit court to the clerk of the circuit court of appeals for the ninth circuit, and by the said clerk of said circuit court of appeals filed in the causes heretofore or about to be taken to the said circuit court of appeals on writs of error by the said plaintiff and defendant in the above-entitled action, and when so filed the said original maps may be used on the argument of the said writs of error with the same force and effect as if the said maps had been inserted in the record transmitted by the clerk in the said several writs of error.

Dated January 31, 1900.

E. W. TOOLE AND
THOS. C. BACH,
Attorneys for Plaintiff.
CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) (Title of court and cause.) Stipulation as to maps. Filed and entered Feb. 1, 1900. Geo. W. Sproule, clerk.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Montana,* } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the
95 honorable the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of (92) ninety-two pages, numbered consecutively from one to (92) ninety-two, is a true and correct transcript of the pleadings, process, records, orders, judgment and all proceedings had in said cause and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the cost of the transcript of record amounts to the sum of thirty-eight dollars and ninety cents, and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States circuit court at Helena, Montana, this 21st day of February, A. D. 1900.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 594. In the United States circuit court of appeals for the ninth circuit. The St. Louis Mining and Milling Company of Montana, plaintiff in error, *vs.* The Montana Mining Company, Limited, defendant in error. Transcript of record. Error to the circuit court of the United States for the district of Montana. Filed February 26, 1900. F. D. Monckton, clerk.

96 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED, Defendant in Error. } No. 594.

In error to the circuit court of the United States for the district of Montana.

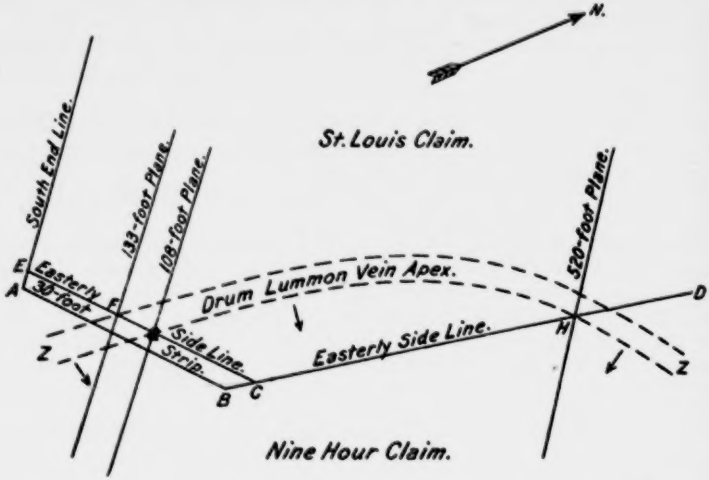
Opinion.

MONDAY, *October* 8, 1900.

This is an action originally brought by The St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass and the value of certain ores alleged

to have been wrongfully appropriated and taken by The Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting — a verdict for the plaintiff in error in the sum of $23,209, plaintiff in error now brings the suit to this court upon certain assignments of error which it alleges deprived it of a larger verdict.

There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis
97 mining claim, situated near Marysville, in the State of Montana, and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims and all details of description which need be considered in this opinion.



By way of explanation of the map, it may be stated that the line E C D is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim and 133 feet southerly from the point C on the line C E; the line marked "108-foot plane" is a similar plane 108 feet from the said point C; and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line D C. The strip of land
98 included within A B C E is a strip 30 feet wide, called in the record the "30-foot" or "compromise" strip. The arrows show the direction of the dip of the vein to be eastwardly and underneath the Nine Hour claim. The discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a dis-

crepancy between the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts.

Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into by which the owners of the St. Louis claim agreed to convey to the
99 owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip, and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim; and further charged the jury that the line E C was a side line common to the two claims, and that so long as the Drum Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of $23,209. A writ of error was sued out by the defendant in error to this court, and this court, in Montana Mining Co. *v.* St. Louis Mining & Milling Co., 102 Fed., 430, sustained the lower court upon these propositions as submitted to the jury, holding the line E C D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion

the 30-foot strip will not be treated separately, but will be re-
100 garded as part and parcel of the Nine Hour claim.

Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made, first, as to the portion of the vein between said planes underneath the 30-foot strip, and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip; but, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and upon assignments of error based upon these rulings, the case is now before this court.

Arthur Brown, H. P. Henderson, E. W. Toole, and T. C. Bach, attorneys for plaintiff in error.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., attorneys for defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, delivered the opinion of the court:

The assignments of error raise but one question which need now be passed upon, all others having been adjudicated upon the writ of error of the defendant in error herein, in the case of Montana M. Co. *v.* St. Louis M. & M. Co., 102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses
101 a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question.

Two important elements enter into the consideration of mining rights: first, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line E C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line E C is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines; and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196, 207; Walrath *v.* Champion Mining Co., 171 U. S.

293, 307. This court has already determined that the line E C D is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides: "The locator of a mining location * * *
102 shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part thereof," and that under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim.

For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitable be cut by a plane parallel with and midway between the 108 and 133 foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the
103 senior locator (Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478, 484),—the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule and its application to the case before the court should be the same whether the vein dips toward the junior location, or toward the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of Fitzgerald *v.* Clark, 17 Montana, 100, the decision in which was affirmed by the

Supreme Court of the United States (171 U. S. 92). But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply.

If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim and up to
104 the point of departure of the apex, or in this case, the foot wall.

It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is, that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line.

It follows, that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

(Endorsed:) Opinion. Filed Oct. 8, 1900. F. D. Monckton, clerk.

105 Ross, circuit judge, dissenting:

I dissent. The case of The Montana Mining Co., Limited, *vs.* The St. Louis Mining & Milling Company, 102 Fed. Rep., 430, referred to in the foregoing opinion, affirmed the existence of extralateral rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. (102 Fed. 430.) The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should

be granted and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line only, be discussed by counsel and fully considered by the court before final determination.

(Endorsed:) No. 594. Dissenting opinion. Filed Oct. 8, 1900. F. D. Monckton, clerk.

106 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED, Defendant in Error,
} No. 594.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said circuit court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes.

(Endorsed:) Judgment. Filed and entered Oct. 8, 1900. F. D. Monckton, clerk.

107 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant in Error.
} No. 594.

To the honorable the judges of the United States circuit court of appeals, ninth judicial circuit:

Comes now the above-named defendant in error, The Montana Mining Company, Limited, and complains that in the record and proceedings had in said cause and in the opinion and judgment of this honorable court, rendered on the 8th day of October, A. D. 1900, upon the cross-writ of error sued out by the plaintiff in error in case No. 567 on the docket of this court, manifest error hath happened to the great damage of your petitioner, in this, to wit:

(*a.*) In holding in the opinion and judgment rendered herein that in a case where the apex of the lead crosses a common side line between two claims at an acute angle, that the locator having the oldest location is entitled to follow the said vein on its dip so long as any part of the apex of such lead is within the surface boundaries of his said mining claim.

(*b.*) The honorable, the circuit court of appeals likewise erred in holding in its said opinion and judgment aforesaid that the
108 said plaintiff in error was not estopped by its contract by the judgment rendered thereon, appearing in the record herein, and by the deed from the said plaintiff in error to your petitioner, executed in pursuance of such contract and judgment, from claiming any mineral found within said thirty-foot strip or compromise ground, and was not enjoined from interfering with your petitioner's possession of said compromise ground and the mineral therein contained.

And your petitioner further shows that in this case and in the case wherein this was brought to this court by a cross-writ of error, the jurisdiction of the circuit court of the ninth circuit, district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, but that in and by the complaint and pleadings on the part of plaintiff in error here and plaintiff in the court below, there were presented questions arising under the Constitution and laws of the United States in this, to wit: Whether the owner of a mining claim under the laws of the United States might follow a vein beyond the side lines of his claim, the apex of which said vein entered and departed through the same side line; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom and entered another claim adjoining and at an acute angle, beyond the point where the whole of the apex of said vein was within the lines of his own claim; and the further question was presented by the pleadings of the said plaintiff as to what faith or credit should be given to the judgment rendered between the parties in this action in the specific-performance case, the judgment-roll whereof appears in the record herein; that as said case was originally brought in
109 the said circuit court of the United States for the ninth circuit, district of Montana, the jurisdiction of said court depended entirely upon the said Federal questions and not upon the diversity of citizenship of the parties thereto.

Wherefore, your petitioner prays for an order allowing it to prosecute a writ of error from the honorable, the Supreme Court of the United States to this court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the honorable the Supreme Court of the United States.

And your petitioner as in duty bound will ever pray.

CHAS. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Petitioner.

Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this court be stayed upon the petitioner executing a good and sufficient bond in the sum of twenty-five thousand dollars, conditioned as required by statute.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for writ of error and order allowing same, &c. Filed October 24, 1900, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

110 Know all men by these presents, that we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto The St. Louis Mining & Milling Company of Montana, in the full and just sum of twenty-five thousand dollars, to be paid to the said The St. Louis Mining & Milling Company of Montana, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of October, in the year of our Lord, one thousand nine hundred.

Whereas, lately at a circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The St. Louis Mining & Milling Company of Montana, plaintiff in error, and The Montana Mining Company, Limited, defendant in error, a judgment was rendered against the said The Montana Mining Company, Limited, and the said The Montana Mining Company, Limited, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said The St. Louis Mining and Milling Company of Montana, citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of December next:

Now, the condition of the above obligation is such, that if the said The Montana Mining Company, Limited, shall prosecute its
111 writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MONTANA MINING CO., L'D, [SEAL.]
By ALEX. BURRELL, *Attorney-in-fact.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By its attorney-in-fact,
JOHN H. ROBERTSON. [SEAL.]

Acknowledged before me the day and year first above written, by Alex. Burrell.

[SEAL.] J. S. MANLEY,
U. S. Commissioner, Northern District of California.

(Cancelled internal-revenue stamps.)

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved. Wm. B. Gilbert, circuit judge. Filed Oct'r 24, 1900, F. D. Monckton, clerk.

112 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED. } No. 594.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and eleven (111) pages, numbered from one (1) to one hundred and eleven (111), inclusive, to be a true copy of the record, and of all proceedings in the above-entitled case, as the same appear of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 15th day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled 11, 15, 1900. F. D. M., cl'k. }

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The St. Louis Mining and Milling Company of Montana, plaintiff in error, and The Montana Mining Company, Limited, defendant in error, No. 594, a manifest error hath happened, to the great damage of the said Montana Mining Company, Limited, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-

preme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 20th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand, nine hundred.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. B. GILBERT,
Circuit Judge.

114 [Endorsed:] Docketed. No. 594. United States circuit court of appeals for the ninth circuit. St. Louis Mining & Milling Co. of Montana, plaintiff in error, *vs.* Montana Mining Co. L'd, defendant in error. Original writ of error. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within writ of error is hereby admitted and receipt of copy acknowledged this 29th day of October, A. D. 1900. Dated at Helena, Montana, on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Montana, Def't in Error

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, in a certain schedule to this writ annexed we certify under the seal of our said circuit court of appeals the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 20th day of December 1900, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals, for the ninth circuit, wherein The Montana Mining Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William B. Gilbert U. S. circuit judge and judge of the United States circuit court of appeals for the ninth circuit this 24th day of October, A. D. 1900.

WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Docketed. No. 594. U. S. circuit court of appeals, for the ninth circuit. St. Louis Mining and Milling Company of Montana pl'ff in error *vs.* The Montana Mining Company. Limited. Original citation. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within citation is hereby admitted and receipt of copy acknowledged this 29th day of October A. D. 1900.

Dated at Helena, Montana on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Mont., Def't in Error.

Endorsed on cover: File No. 18,002. U. S. C. C. of appeals, 9th circuit. Term No. 214. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining and Milling Company of Montana. Filed December 18, 1900.